Supreme Court, U.S.
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No. 93-___

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Elizabeth Ridgeway, *et al.*,
Petitioners,

v.

Pfizer, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in holding -- in conflict with other courts of appeals -- that class members who object to a class certification and proposed class action settlement, and vigorously participate in the district court proceedings, must formally move and be permitted to intervene in order to appeal the district court's certification of the class and approval of the settlement?

2. Whether class members who object to a class certification and proposed class action settlement may constitutionally be denied their right to appeal on the sole ground that they failed to intervene, where the court-ordered notice to the class did not specify intervention as a condition for appeal, the district court and the settling parties treated the objecting class members as *de facto* intervenors throughout the proceedings, and the published decisions of the court of appeals unequivocally hold that intervention is not required to confer appellate standing on objecting class members?

PARTIES TO THE PROCEEDING

In addition to petitioners Elizabeth Ridgeway, Rosemary Grunsby, and Fred Grunsby, each of whom appeared as Class Members-Appellants in the Sixth Circuit proceeding, respondents Arthur Ray Bowling, *et al.*, appeared as Plaintiffs-Appellees and respondents Pfizer, Inc. and Shiley Incorporated appeared as Defendants-Appellees before the Sixth Circuit.

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OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit dismissing petitioners' appeal is reported at 14 F.3d 600 (Table) (1994) and is reproduced in the petitioners' appendix at 1a. The order of the United States Court of Appeals for the Sixth Circuit denying petitioners' petition for rehearing *en banc* is reproduced in petitioners' appendix at 3a.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1993. 1a. Petitioners filed a timely petition for rehearing on January 3, 1994, which was denied by the court of appeals on March 4, 1994. 3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This petition arises out of a district court's certification of a class and approval of a class action settlement involving 50,000 to 100,000 heart-valve implantees who reside all over the world.[1] As recounted in further detail below, petitioners are unnamed class members who complied fully with the district court's order notifying them of the steps to take to object to the proposed class certification and settlement. However, in keeping with the court's order and established Sixth Circuit precedent, they did not move formally to intervene in the case prior to the district court's decision approving the settlement. When they appealed the district court's order certifying the class and approving the settlement, the Sixth Circuit issued an unpublished order dismissing their appeal on the ground that, because they had not formally intervened in the

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[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1332. For the Court's convenience, copies of the district court's opinion approving the settlement, which is reported at 143 F.R.D. 141 (S.D. Ohio 1992), have been lodged with the Clerk. This petition does not seek review of the merits of that decision, but rather of the Sixth Circuit's order dismissing petitioners' appeal for lack of standing.

district court, they lacked standing to seek appellate review of the settlement's approval. In so ruling, the Sixth Circuit contradicted its own prior published decisions and deepened an already vast split among the federal circuits with respect to the question presented in this case -- *i.e.*, whether class members who respond to a court-ordered notice inviting them to object to a proposed class certification and a proposed settlement must intervene in order to have standing to appeal.

Petitioners are Elizabeth Ridgeway and Rosemary Grunsby, both of whom presently have implanted in them "Bjork-Shiley" heart valves manufactured and distributed by respondents Pfizer, Inc. and its wholly owned subsidiary, Shiley Incorporated (collectively, "Pfizer"), and Fred Grunsby, the husband of Rosemary. Although petitioners' heart valves have not yet fractured, petitioners live with the fear that their valves will fracture at any time.[2]

Prior to becoming involved as objectors to the class certification and settlement in this case, petitioners were the named plaintiffs in a class action filed in a Pennsylvania state court seeking compensatory and punitive damages against Pfizer on behalf of a class of pre-fracture implantees with a nexus to Pennsylvania. *Taylor v. Shiley*, Court of Common Pleas, First Judicial District of Pennsylvania, Civil Trial Division (Philadelphia) February Term, 1986, No. 2087. Among other things, petitioners alleged in *Taylor* that Pfizer defrauded them,

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[2] From 1979 to 1986, Pfizer produced thousands of Bjork-Shiley heart valves. Somewhere between 50,000 and 100,000 of these valves are implanted in patients from all over the world. It is estimated that about 450 of these heart valves have fractured, resulting in approximately 300 fatalities. Pfizer's critics allege that these heart valves have a tendency to fracture because of design and manufacturing defects. *See Bowling*, 143 F.R.D at 147. Ultimately, under extreme pressure from the United States Food and Drug Administration ("FDA"), Pfizer recalled all its heart valves. *See Michael v. Shiley, Inc. et al.*, No. 93-1729, 1994 U.S. Dist. LEXIS (E.D. Penn. Feb. 25, 1994, as amended March 31, 1994).

their doctors, and the FDA by continuously providing incomplete and misleading information regarding the number of strut fractures occurring in the Bjork-Shiley valves.

The *Taylor* action is significant because, whereas Pfizer had succeeded in obtaining dismissals of 27 pre-fracture heart-valve cases in other jurisdictions on legal grounds, the court in *Taylor* had upheld petitioners' causes of action for fraud, intentional infliction of emotional distress, and breach of warranty. *See Bowling*, 143 F.R.D. at 147.[3] Thus, unlike plaintiffs in most other jurisdictions, petitioners in *Taylor* were well situated to obtain a sizable recovery against Pfizer on behalf of the putative Pennsylvania class.

On June 30, 1989, after the decision rejecting Pfizer's motion to dismiss in *Taylor* and after numerous discovery disputes and motions had been resolved, petitioners filed a comprehensive motion for certification of the *Taylor* class. In response, Pfizer filed a skeletal answer to the motion for class certification along with a voluminous motion for summary judgment that raised numerous factual issues. Over petitioners' objections, the court ordered that it would not consider the earlier-filed motion for class certification until it disposed of Pfizer's motion for summary judgment. After many months of discovery disputes relating to Pfizer's summary judgment motion, the court finally granted petitioners' discovery motions. Pfizer responded with an offer to produce over six million documents stored in a litigation warehouse in California. The court in *Taylor* ordered Pfizer to provide indices of the documents.

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[3] In those 27 cases, Pfizer obtained summary judgment on the ground that a plaintiff may not recover for her fear or anxiety that a heart valve may fracture in the future. *Id.* Petitioners overcame that hurdle in *Taylor* because, unlike most other plaintiffs, they went beyond merely alleging negligence and product liability theories and pled causes of action based on fraud and other intentional torts.

On March 28, 1991, while petitioners' counsel were reviewing the thousands of pages of indices provided by Pfizer and other discovery was being pursued in *Taylor* (but before there was a ruling on class certification), a Cincinnati law firm filed a class action complaint in the United States District Court for the Eastern District of Kentucky that alleged a putative class consisting of all persons in the United States with Pfizer's 60-degree heart valves. *Wright v. Pfizer*, CA. No. 91-58 (E.D. Ky. March 18, 1991). Less than one month later, and with the concurrence of Pfizer, the same law firm filed the identical complaint in federal court in Cincinnati on behalf of the same named plaintiffs (but adding one Ohio resident), seeking certification of the identical class. F 1.[4] That firm then abruptly abandoned the Kentucky case, *Wri* in favor of the Ohio case, *Bowling*. *See* 143 F.R.D. at 148. Both of these filings were without the knowledge of petitioners or class counsel in *Taylor*.

Shortly after the filing of the complaint in *Bowling*, class counsel and Pfizer privately agreed to stipulate to class certification and settle the case. On January 23, 1992, the district court signed a perfunctory order conditionally certifying a class under Fed. R. Civ. P. 23(b)(3) that is much broader in scope than the class alleged in the complaint and which, by stipulation of counsel, now includes in its sweep all recipients of 60-degree heart valves and recipients of a different product -- 70-degree heart valves -- and their spouses, wherever they might reside, anywhere on earth. *Compare* RA 1 (class action complaint) *with* RA 43 (notice of class action settlement). During the period between the filing of the *Bowling* complaint and the date the settlement was announced, class counsel had taken only nominal discovery, at best. *See Bowling*, 143 F.R.D. at 161.

In February of 1992, petitioners received notice for the

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[4] Citations to "RA" are to the record on appeal filed with the Sixth Circuit in connection with petitioners' appeal of the district court's decision approving the *Bowling* settlement.

first time that a federal district court in Ohio had certified a global class under Fed. R. Civ. P. 23(b)(3) that included all recipients of Pfizer's heart valves that had not yet malfunctioned, as well as the spouses of those recipients. RA 43. The *Bowling* notice stated that, if the settlement were approved, petitioners' claims against Pfizer would be terminated, unless petitioners elected to opt out of the class. The notice informed petitioners that they could not object to the class certification or the proposed settlement if they elected to opt out of the class and that, if they wanted to participate in the fairness hearing, they or their attorney must file an appearance. There was no suggestion in the notice that petitioners would have to intervene in order to have standing to appeal any decision approving the settlement over their objections. *Id.*

The proposed settlement described in the notice essentially provided a small cash payment "of some amount less than $4000" for pre-fracture implantees, a fund for medical research designed to discover a medically-safe diagnostic technique to predict when a fracture might occur (relief that was of little benefit to the overwhelming majority of class members), a system of compensation for fracture victims, and a restricted explantation fund. *See Bowling*, 143 F.R.D. at 140. The *Bowling* notice said nothing about the *Taylor* class action that was pending simultaneously for the benefit of thousands of *Bowling* class members with a nexus to Pennsylvania. RA 43.

The *Bowling* class notice came as a complete surprise to petitioners since Pfizer had notified neither them nor the judge in Pennsylvania that Pfizer (a party-defendant in *Taylor*) had agreed to settle an overlapping class that would effectively terminate the rights of the putative class members in *Taylor*. Because Pfizer had been successful in retarding the progress of *Taylor* with extended motion practice and discovery disputes, the Pennsylvania court had not yet reached the point of ruling on the class certification motion in *Taylor* or of ordering notice to the *Taylor* class. In addition, petitioners did not know the names and addresses of the putative class members in *Taylor* because Pfizer had refused to provide this

information in discovery. As a result, the thousands of putative class members in *Taylor* had no way of knowing that they had a potentially attractive alternative to the proposed settlement described in the *Bowling* notice.

At this point, petitioners were faced with the dilemma of whether to opt out of the *Bowling* class or remain in as objectors. On the one hand, petitioners realized that, if they opted out of *Bowling*, they could pursue their individual claims in *Taylor* and hope to achieve monetary recoveries that would dwarf the $4,000 or less they would receive from the *Bowling* settlement. On the other hand, if petitioners opted out, they would lose the opportunity to object to class certification and the *Bowling* settlement, with the result that thousands of putative class members in *Taylor* (who did not know about the potential benefits *Taylor* offered as an alternative to the *Bowling* settlement) would have their causes of action against Pfizer extinguished by virtue of the judgment and settlement in *Bowling*. Petitioners ultimately determined that they could not opt out because, as they saw it, they had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in Pennsylvania state court.

On May 5, 1992, having decided that they had no real choice but to remain in the class, petitioners filed timely appearances and written objections to the proposed settlement. RA 72, 143. Thereafter, petitioners were allowed to participate fully in all aspects of the district court proceedings, including the fairness hearing held on June 5, 8, and 9 and July 22, 1992. *See Bowling*, 143 F.R.D. at 146.[5]

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[5] Thus, petitioners: (a) filed and obtained rulings on numerous substantive and procedural matters, RA 83, 97, 113, 140, 145, 158, 168, 190, 202, 206-208, 211, 216, 229, 235, 230, 250, 221; (b) obtained in response to their written and oral motions an explicit written order granting their right to be heard and to participate, *see Bowling*, 143 F.R.D. at 147, RA 229, 250; (c) made substantive oral presentations and arguments at each settlement-related hearing

Petitioners had no reason to intervene in the district court proceedings, since the class notice did not require intervention and two published decisions of the Sixth Circuit hold that intervention is not necessary to confer standing on an objecting class member to appeal a district court decision approving a class action settlement. *See Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942).[6] At no point during the course of the fairness hearing did the district court, Pfizer, or class counsel suggest that intervention was necessary or appropriate. In fact, at every juncture in the proceedings, the district court gave every indication that intervention was *not* required, even to the point of permitting petitioners' counsel to file a *pro forma* fee petition because petitioners intended to appeal the settlement's approval, and further allowing them to defer the filing of a comprehensive fee petition until their Sixth Circuit appeal was resolved. RA 256.

Petitioners moved repeatedly in the district court to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 159, 190, 207, 208, 221, 251. The basis for petitioners' request for a subclass was that the Pennsylvania court in *Taylor* had entered an order denying essentially the same motion to

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and proceeding, RA 97, 113, 140, 158, 202, 207, 208, 251; (d) were permitted to cross-examine and to question experts who had made presentations on behalf of the proponents of the settlement, RA 202; (e) took written discovery of class counsel and respondents, RA 83, 229; (f) marked numerous exhibits and introduced into the record affidavits and other evidence, RA 143, 190, 202, 208; (g) were invited to, attended, and participated in status conferences and hearings, RA 158; (h) raised issues and obtained court action on matters that were peculiar to petitioners, and were not raised by other parties, RA 143, 159, 190, 218, 221, 229, 210, 145, 168, 206, 211, 235, 250; and (i) had their Philadelphia-based counsel admitted *pro hac vice* and appeared as well through local counsel, RA 84, 99, 230, 272.

[6] As explained *infra* at Point III, two major treatises on class action procedure and two other courts of appeals also identify the Sixth Circuit as not requiring class members to intervene as a condition of appeal.

dismiss on which Pfizer had obtained favorable rulings in 27 other courts. *See* n.3, *supra*. Petitioners also had a viable claim for punitive damages, and there were no statute of repose or statute of limitations problems in *Taylor* -- problems that the settling parties in *Bowling* used to justify the nominal monetary recovery provided by the proposed settlement. Therefore, in petitioners' view, the putative class in *Taylor* had an advantage over class members in *Bowling* who were in jurisdictions bound by those 27 adverse rulings. Notwithstanding these arguments, the district court denied petitioners' motion to certify a subclass of Pennsylvania residents. *See Bowling*, 143 F.R.D. at 161; RA 250.

After the fairness hearing, on August 19, 1992, the district court issued an opinion and order in which it certified a final settlement class under Rule 23(b)(3) and approved the settlement with some modifications, several of which grew out of petitioners' objections at the fairness hearing. The district court's opinion was devoted primarily to the issues and arguments raised by petitioners. Indeed, the opinion describes petitioners as one of two "principal objectors" to the settlement. *Bowling*, 143 F.R.D. at 151. A final order was entered on September 9, 1992. RA 255.[7]

Petitioners filed a prompt notice of appeal to the Sixth Circuit on September 17, 1992. RA 258. A few days after filing the notice appealing the settlement's approval, petitioners were informed that Pfizer intended to file a motion to dismiss on the ground that petitioners lacked standing to appeal because they had not formally intervened in the case. Solely as a protective

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[7] The text of the reported opinion in *Bowling* begins at 143 F.R.D. 145 and ends on page 170. Page 145 describes some, but not all, of the written documents, pleadings, objections and motions petitioners had filed. The court described petitioners as "the Green firm," since petitioners' lead attorney was Gary Green, Esq. Thereafter, the court concentrated on matters raised by or pertaining to the Green firm on page 146 and from pages 151 through 167. Hence, *18* pages of the district court's opinion related to the participation of petitioners both before, during, and at the conclusion of the fairness hearing.

measure, and because the appeal period had not yet expired, petitioners filed in the district court on September 25, 1992 a motion to intervene in aid of their appeal. RA 265. On October 21, 1992, petitioners filed an amended motion to intervene and a motion under Fed. R. Civ. P. 60(b) requesting that, if the district court granted their motion to intervene, the date of the court's order relate back to the date on which petitioners entered their appearance in *Bowling*. RA 288.

By order dated November 9, 1992, the district court declined to rule on petitioners' intervention motions on the ground that the filing of the notice of appeal had created "uncertainty" about the court's continuing jurisdiction over the case. 5a. Petitioners filed a separate appeal from that order on December 2, 1992.

On March 2, 1993, Pfizer moved to dismiss petitioners' appeal of the decision approving the settlement on the ground that, notwithstanding their vigorous participation throughout the district court proceedings, petitioners lacked standing to appeal because they had not formally intervened in the case. In its brief, Pfizer placed heavy reliance on two *unpublished* Sixth Circuit decisions holding that unnamed class members must intervene in order to have standing to appeal. *See Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (1988); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (1987).[8] Pfizer's sole discussion of the two *published* Sixth Circuit decisions that established a contrary rule -- *Cohen* and *Sertic* -- was in a footnote, in which Pfizer suggested that those cases had been overruled by the later, unpublished Sixth Circuit orders in *Police Officers* and *Thompson*. As to petitioners' pending motion to intervene, Pfizer argued that the district court lacked jurisdiction to decide the motion once the notice of appeal was filed and that, even if the district court had jurisdiction, the motion would have to be denied as untimely.

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[8] The reported decisions in these cases merely state that the appeals were dismissed.

In a two-paragraph order dated December 21, 1993, marked "Not Recommended for Full Text Publication" and signed by the court clerk, the Sixth Circuit dismissed petitioners' appeal on the ground that, "[b]ecause the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue the appeal." 1a. The unpublished order did not mention the Sixth Circuit's prior decisions in *Cohen* and *Sertic* establishing that intervention was not required. Nor did it mention the prior, unpublished orders in *Police Officers* and *Thompson* cited by Pfizer. Instead, it relied on decisions in three other circuits holding that intervention *is* required to confer appellate standing. 1a-2a.

In another order issued on December 21, 1993, the Sixth Circuit affirmed the district court's decision declining to rule on petitioners' motion to intervene. *See* 14 F.3d 600 (Table) (1994), reprinted at 6a. In this order, also marked "Not Recommended for Full Text Publication," the Court reasoned that the district court lacked jurisdiction to decide petitioners' motion to intervene because the filing of the notice of appeal of the settlement's approval had deprived the district court of jurisdiction over the case. 7a.

Petitioners then petitioned for rehearing *en banc* of the Sixth Circuit's order dismissing their appeal of the settlement's approval arguing, *inter alia*, that the panel's unpublished order contradicted two published Sixth Circuit decisions -- *Cohen* and *Sertic* -- holding that an unnamed class member did not have to intervene to have standing to appeal a final judgment or settlement. Petitioners pointed out that leading commentators on class action procedure have identified the Sixth Circuit as a jurisdiction where objecting class members have the right to appeal the approval of a class settlement without intervening as parties to the action, and further explained that other circuit courts had identified the Sixth Circuit as not requiring intervention to confer standing to appeal. *See infra* at Point III. Petitioners also asserted that, by dismissing their appeal in an unpublished order, the panel had taken the

extraordinary step of creating a non-precedent-setting ruling that contradicted published Sixth Circuit decisions, thereby depriving petitioners of their right to due process under the U.S. Constitution.

In a two-paragraph order dated March 4, 1994, which cited no authority and did not acknowledge the inconsistency between the published and unpublished decisions of the court, the Sixth Circuit denied the petition for rehearing. 3a.[9]

The result of the foregoing is that, unless this petition is granted, there will be no appeal of the *Bowling* settlement, even though it discriminates against class members -- like the Pennsylvania residents in *Taylor* -- whose home-state courts are hospitable to pre-fracture claims.[10] An additional result of the

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[9] On April 5, 1994, the district court finally ruled on petitioners' pending motion to intervene. In a two-paragraph order, the district court dismissed petitioners' motion, citing "the substantial delay between the approval of the settlement and return of the case to this Court, and the fact that intervention at this point would be prejudicial to the class . . .." 8a. On April 13, 1994, petitioners filed a motion pursuant to Rule 59(e) and Rule 24(a) and (b) of the Federal Rules of Civil Procedure seeking leave to intervene principally for the purpose of participating in the post-judgment proceedings. The district court has not yet ruled on this motion. In addition, on April 12, 1994, the district court denied a Rule 60(b) motion for relief from the decision approving the settlement that had been filed by petitioners in November 1993, while their appeal of the settlement's approval was pending before the Sixth Circuit. On May 3, 1994, petitioners filed a notice of appeal from that decision. On May 17, 1994, the Sixth Circuit issued an order directing petitioners to show cause why their appeal of the denial of the 60(b) motion should not be dismissed for lack of standing due to their failure to intervene. 9a.

[10] For example, as in *Taylor*, a California court has upheld a cause of action for fraud against Pfizer. *Khan v. Shiley, Inc.*, 217 Cal. App. 3d 848, 266 Cal. Rptr. 106 (4th Dist. 1990), *review denied*, 1990 Cal. LEXIS 1952 (May 3, 1990). As a result, nearly 1,000 class members opted out of *Bowling* to pursue their individual heart valve claims against Pfizer in California. According to news reports, at least 340 of these individuals ultimately obtained settlements in excess of $100,000 per pre-fracture implantee. *See* "$31-Million Settlement May

Sixth Circuit's ruling is that, unless this petition is granted, unsuspecting individuals who are affected by and object to the terms of other class actions in that jurisdiction will continue to rely on the published case law, object without formally intervening, and then have their appeals dismissed because of their failure to intervene.

REASONS FOR GRANTING THE WRIT

I. There Is A Deep Split In The Circuits As To Whether A Class Member Who Objects To A Class Certification And A Proposed Class Action Settlement Must Formally Move And Be Permitted To Intervene In Order To Appeal.

The first reason the writ should be granted is to resolve the deep split among the circuits on the precise question presented in this case: whether an unnamed class member who objects to a proposed class action settlement must formally move and be permitted to intervene in the case in order to appeal an order approving the settlement? *See generally* Timothy A. Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933, 934-40 (1993) (discussing circuit split). Only review by this Court will ensure uniformity in the procedure to be followed by an absent class member who wishes to preserve an opportunity for appellate review.

Three federal courts of appeals -- the Third, Seventh, and Ninth Circuits -- have consistently allowed objecting,

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Be in Works on Shiley Heart Valve," *Los Angeles Times*, p. D1 (October 17, 1992). The putative *Taylor* class could very well have achieved comparable recoveries in Pennsylvania if the district court had not denied petitioners' motion to certify a Pennsylvania sub-class and approved the *Bowling* settlement.

nonintervening class members to appeal approvals of settlement agreements.[11] These circuits' decisions are in accordance with the explanation of current law set forth in all three of the leading treatises on class action procedure in the federal courts. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993) ("[a] member of a class who appears in response to the court's notice given pursuant to [Rule 23(e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record.") (footnote omitted); Herbert Newberg & Alba

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[11] *Third Circuit*: *Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (1993) (denial of objecting class members' intervention motion not immediately appealable under collateral order doctrine since intervention would not be required to appeal merits of settlement); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (1971) (nonintervening, objecting class members have standing to appeal class action settlement). *Cf. Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1310 (1993) (nonintervening, objecting shareholders have standing to appeal approval of settlement in a derivative suit).

Seventh Circuit: *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (1980) (nonintervening, objecting class members have right to appeal from a class action judgment); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (1976) (nonintervening, objecting class members have standing to appeal settlement agreement); *Research Corp. v. Asgrow Seed Company*, 425 F.2d 1059, 1060 (1970) (nonintervening class member who appears in response to Rule 23(e) notice and objects to a settlement has right to appeal from an adverse judgment). *Cf. In the Matter of VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 368 (1992) (unnamed class member must intervene in order to appeal post-settlement order implementing settlement agreement; distinguishing *Research Corp.* on factual grounds, but acknowledging its continued viability with respect to appeals of decisions approving settlements).

Ninth Circuit: In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (1982) ("a class member may appeal from an order approving a settlement to which the member objects"), *aff'd*, 459 U.S. 1191 (1983); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (1981) (dissatisfied class member could have challenged settlement by direct appeal); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (1977) (unnamed class members appealing from the district court's approval of a class action settlement had "legal rights affected by the settlement and [thus] had standing to sue").

Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) ("[c]ertainly class members are parties for purposes of . . . objecting to and appealing from an order approving a class settlement . . ."); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986) ("[o]f course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment.") (footnote omitted).

The decisions holding that unnamed class members have standing to appeal a settlement's approval recognize that an appeal is often the only mechanism by which an absent class member can protect his or her rights. *See generally Ace Heating*, 453 F.2d at 33. Permitting class members to opt out of class actions does not provide adequate protection, since, in reality, "many small claimants frequently have no litigable claims unless aggregated." *Id.* Absent a right to appeal, "such claimants would be faced with equally unpalatable alternatives -- accept either nothing at all or a possibly unfair settlement." *Id.*

In contrary authority, the Fifth, Eighth, Tenth, and Eleventh Circuits have ruled that nonintervening, objecting class members lack standing to appeal an order approving a settlement between the named parties of a class action.[12] These courts have

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[12] *Fifth Circuit*: *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (1993) (appellate court lacks jurisdiction to consider appeal by class member who has not attempted to intervene as a named party); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (1988) (unnamed members of certified plaintiff class lacked standing to challenge consent decree approving a settlement between the named parties).

Eighth Circuit: *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (1992) ("unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so"), *cert. denied*, 113 S. Ct. 1251 (1993).

justified their rulings in part on the ground that "class actions could be unmanageable and nonproductive if each member could individually decide to appeal." *Guthrie*, 815 F.2d at 628. *See also Croyden*, 969 F.2d at 679; *Walker*, 858 F.2d at 1072. As other courts and commentators have pointed out, however, a rule requiring intervention will actually render class actions *more* unwieldy than simply permitting objecting class members to appeal. *See* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 954. *See also infra* at Point II.B. (discussing fallacy underlying claim that rule requiring intervention increases judicial efficiency).

Prior to the decision in this case, petitioners believed that the Sixth Circuit's view accorded with that of the Third, Seventh, and Ninth Circuit's. Now, as a result of the proceedings below, it is difficult to state precisely where the Sixth Circuit stands on this issue. On the one hand, the two *published* Sixth Circuit decisions that relate to the rights of nonintervening class members to appeal a settlement's approval hold that intervention is *not* a prerequisite to appeal. *See Sertic*, 459 F.2d at 579; *Cohen*, 127 F.2d at 721.[13] *See also Steiner v. Fruehauf Corp.*, 121 F.R.D.

Tenth Circuit: *Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (1993) ("the policy underlying class actions under Rule 23 is best served by requiring an unnamed class member in a class action under Rule 23 to move formally to intervene and to be granted intervenor status in order to gain standing to appeal the adequacy of the settlement").

Eleventh Circuit: *Guthrie v. Evans*, 815 F.2d 626, 627 (1987) ("a class member who is not a named plaintiff [ ] does not have standing to appeal the final judgment in [a] class action.")

[13] *Cohen* was a shareholder derivative suit in which an unnamed class member received notice of a proposed settlement, appeared at a hearing to oppose the settlement, and also moved to intervene in the action. The class member did not appeal the denial of the motion to intervene, but did appeal the decision approving the settlement. The defendants moved to dismiss for lack of standing on the ground that the stockholder "is not a party to this cause and hence has no

304, 307 (E.D. Mich. 1988) ("an objector . . . has a right to appeal from an adverse final judgment although he did not become a formal party of record"), *aff'd sub nom., Priddy v. Edelman*, 883 F.2d 438 (6th Cir. 1989). On the other hand, three *unpublished* Sixth Circuit orders -- including the order entered in this case dismissing petitioners' appeal -- unequivocally hold (without benefit of explanation or reasoning) that nonintervening class members have no standing to appeal a settlement's approval. *Bowling v. Pfizer, Inc.*, reprinted at 1a; *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (1988); *Thompson*, 827 F.2d 770 (Table) (1987).

The lack of clarity as to the Sixth Circuit's stance is due to the fact that, according to the Sixth Circuit's own rules, only *published* decisions have any precedential value. *See* Sixth Circuit Internal Operating Procedure ("IOP") 22.4; *Watts v. Burkart, et al.*, 978 F.2d 269, 270 n.1 (6th Cir. 1992) (en banc); *U.S. v. Gomez-Lemos*, 939 F.2d 326, 336 (6th Cir. 1991) (concurring opinion). In addition, all published decisions are binding on subsequent panels, and court *en banc* consideration is required to overrule a prior published opinion. *See* 6th Circuit IOP 22.4. Since the orders in *Bowling*, *Police Officers*, and *Thompson* were not published, much less the product of *en banc* consideration, they have no precedential value and cannot properly be seen to have overruled the contrary, earlier decisions in *Cohen* and *Sertic*. Thus, if the Sixth Circuit is true to its own procedures, then *Cohen*

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standing in this court." The Sixth Circuit disagreed, stating that "[a]ppellant appeared in court in answer to the court's notice to show cause why the settlement should not be approved. This being the case, he was 'like a defendant who is summoned by process of court and after an adverse ruling has the right to appeal.' . . . Appellant is entitled to prosecute the appeal as of right." *Id.* at 724 (citations omitted). *Sertic* was a class action proceeding in which the Sixth Circuit cited *Cohen* as a basis for its decision permitting unnamed class members to appeal even though they had not succeeded in intervening before the district court. 459 F.2d at 579.

and *Sertic* remain the rule in that circuit, and intervention is *not* required to preserve an objectors' standing to appeal a settlement's approval. The ruling in this case, however, suggests that the Sixth Circuit now has two rules: one published and one "Not Recommended For Full Text Publication."

However one characterizes the Sixth Circuit's position, it is clear that the courts of appeals are deeply split on the issue presented in this case. Part of the confusion can be traced to this Court's decision in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), a Title VII lawsuit in which a consent decree approving a settlement was challenged by individuals who were not parties to the litigation. (The certified class consisted of *Hispanic* police officers who claimed that a civil service examination they were required to take caused a disparate impact in promotion decisions. A group of *white* police officers who were neither members of the class nor of any of the groups of other white officers who *had* moved to intervene appealed the settlement eventually reached between the class and the city.) This Court affirmed the dismissal of their appeal, stating that, "because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 494 U.S. at 304.

In the view of some circuit courts, *Marino* "provide[s] substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679; *see also Walker*, 858 F.2d at 1074. Other courts and commentators have disagreed, noting that, because the objectors in *Marino* were not even members of the class, that decision did not "settle[ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic*, 2 F.3d at 1307; *see also* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 946 (despite *Marino*, "lower courts . . . have decided that a nonparty

may sometimes appeal without prior intervention") (footnote omitted) (collecting cases); N.E. Paolini, *Recent Development: Walker v. City of Mesquite: The Nonappealability of Class Action Consent Decrees by Non-named Class Members*, 63 Tul. L. Rev. 1732 (June 1989) ("[t]he *Walker* court . . . dramatically broadened the *Marino* holding to include non-named class members.")

Petitioners submit that *Marino* has no application here, since that case did not in any way address the issue of standing of a *bona fide* class member who participated vigorously throughout the district court proceedings to appeal a ruling directly affecting his or her rights. In any event, *Marino* has not eliminated or resolved the preexisting disagreement among the circuits as to the rights of unnamed class members to appeal judgments that directly affect their interests. *See, e.g., Carlough*, 5 F.3d at 714 (post-*Marino* decision holding that objecting class members may appeal decision approving settlement without intervening); *cf. Bell Atlantic Corp.*, 2 F.3d at 1310 (post-*Marino* decision discussing deep split in circuits and holding that nonintervening, objecting shareholders have standing to appeal approval of settlement of derivative action). The writ should be granted so as to resolve that confusion and protect members of future classes from being caught in the same trap of conflicting precedent that snared petitioners in this case.

II. This Case Presents An Important Question Of Federal Law That Has Not Been, But Should Be, Decided By This Court.

Review is also warranted because this case presents an important question of federal law that should be decided by this Court. The question presented is important because requiring intervention does not simply impose an additional paperwork burden on objecting class members. To the contrary, this requirement has the practical effect of drastically limiting the availability of appellate review of class certification decisions and of the merits of class action settlements. At the same time, the

intervention requirement greatly increases the burdens of class action litigation on class members and the courts -- precisely the opposite result of what the intervention rule ostensibly was intended to achieve.

A. The Intervention Requirement Unduly Limits Objecting Class Members' Rights To Appeal.

The most egregious effect of the intervention requirement is that it operates greatly to restrict the availability of appellate review of both class certification decisions and the merits of class action settlements.[14] Without such review, there is no meaningful procedural check on the actions of district courts. Yet this check is especially critical in the class action context, where there is an inherent danger that unnamed class members' rights may be compromised in favor of the interests of the class representatives (or their attorneys). As the district court itself noted in *Bowling*, "[t]he possibility of collusion exists in class actions. A defendant has an interest in minimizing its liability; class counsel has an interest in his attorney's fee." 143 F.R.D. at 152 (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-89 (Summer 1987)). In order to protect against such collusion, the Federal Rules of Civil Procedure require district courts to evaluate the fairness of proposed class action settlements before they can be implemented. *See* Fed. R. Civ. P. 23(e). However, absent appellate review, "even the most conscientious and diligent judge may be tempted to overlook what are often eleventh hour objections to settlements . . . ." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 947. Thus, any rule limiting appellate review of class action settlements increases the potential for unfair,

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[14] Although the Supreme Court has never held that due process requires appellate review of lower court decisions, *see, e.g., Lindsey v. Normet*, 405 U.S. 56, 77 (1972), Congress has conferred appellate jurisdiction on the courts of appeals from "all final decisions of the district courts." 28 U.S.C. § 1291.

collusive settlements that are not in the best interests of the class. This is precisely the result the drafters of Rule 23 sought to avoid by prohibiting the dismissal or compromise of class actions without judicial approval.

Appellate review is equally important with respect to class certification decisions. This Court has recognized that "actual, not presumed, conformance with [the certification requirements of] Fed. R. Civ. P. 23(a) remains . . . indispensable." *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). One essential way to ensure that the "actual conformance" standard has been met is to permit appellate review of certification decisions. *Id.* Any restrictions on the availability of such review invites district courts to deviate from the certification requirements on which absent class members' rights depend -- a result directly contrary to this Court's decision in *Falcon*.[15]

The intervention requirement limits the availability of appellate review in two ways. First, many class members will simply fail to intervene, either because they are not represented by counsel or are unaware that intervention is required in order to preserve their rights to appeal.[16] Second, and perhaps more importantly, even objectors who *do* move to intervene may be deprived of their opportunity to appeal a class certification or a settlement's approval by adverse decisions on their intervention motions.

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[15] In this case, for example, a major portion of petitioners' appeal on the merits argued that the district court's certification of the *Bowling* class fell far short of "actual conformance" with Rule 23. Yet the Sixth Circuit's dismissal of petitioners' appeal effectively rendered the certification decision absolutely immune from scrutiny.

[16] The danger that class members will unwittingly forfeit their appellate rights is made more likely where, as in this case, the class notice places stringent conditions on the right to participate in the district court proceedings that do *not* include the need to file a motion to intervene. RA 43.

Rule 24 of the Federal Rules of Civil Procedure provides for two types of intervention: intervention as of right and permissive intervention. Intervention as of right is available only if the proposed intervenors demonstrate that they are not being adequately represented by existing parties. *See Bradley v. Milliken*, 828 F.2d 1186, 1191 (6th Cir. 1987). Satisfying this requirement is extremely difficult under *any* circumstances;[17] it is even harder where, as here, a proposed settlement is reached prior to class certification, and a conditional settlement class is certified without the district court having considered the adequacy of representation. Intervention motions can be expected to fail at this stage because there is a presumption (especially after a court has certified a conditional settlement class, as was done here) that all class members' interests are represented adequately, "against which the petitioner must demonstrate adversity of interest, collusion or non-feasance." *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978) (quoting *Virginia v. Westinghouse Elec. Corp.*, 542 F.2d 214, 216 (4th Cir. 1976)). Making such a demonstration on a bare record is difficult, if not impossible. Thus, as a practical matter, intervention as of right could easily be denied in cases where the class action is settled at

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[17] In general, "the applicant for intervention bears the burden of demonstrating inadequate representation." *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). This requires "overcom[ing] the presumption of adequacy of representation that arises when a proposed intervenor and a party to the suit . . . have the same ultimate objective." *Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (per curiam). An applicant for intervention fails to meet its burden of demonstrating inadequate representation "when no collusion is shown between the representative and an opposing party, when the representative does not have or represent an interest adverse to the proposed intervenor, and when the representative has not failed in its fulfillment of his duty." *Id.* A mere disagreement over litigation strategy does not, in and of itself, establish inadequacy of representation. *Bradley*, 828 F.2d at 1192 (citation omitted).

an early stage of the litigation.[18]

In addition, in its opposition to petitioners' motion to intervene in this case, Pfizer argued that intervention as of right is actually *foreclosed* when the class action has been certified under Rule 23(b)(3), which gives absent class members the right to opt out. *See Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 332 (5th Cir. 1982); *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 289 (N.D. Cal. 1976). Thus, in Pfizer's view, petitioners were limited to seeking permissive intervention under Rule 24(b). If true, this would pose an even more formidable barrier to appeal, since "[i]ntervention under Rule 24(b) is addressed to the sound discretion of the trial court." *Afro American Patrolmens League v. Duck*, 503 F.2d 294, 298 (6th Cir. 1974) (citation omitted). Moreover, a decision denying permissive intervention may be overturned only upon a showing that the district court abused its discretion -- a very rare event indeed. *See Bradley*, 828 F.2d at 1194; Moore, 3B *Moore's Federal Practice*, ¶ 24.15 at 24-152 (reversal for abuse of discretion of district court order denying permissive intervention is "exceedingly rare").

Because of these hurdles, decisions denying motions to intervene in the class action context are legion. *See generally* Wright, 7B *Federal Practice and Procedure*, § 1799 at 443-46 nn. 16-18. Thus, the rule requiring intervention as a prerequisite to appeal could operate greatly to restrict appellate review of class certification decisions and class action settlements. The fact that three (and arguably four) of the courts of appeals have adopted a

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[18] The Sixth Circuit has also held that it is proper to deny a motion to intervene in cases where the applicant "had availed herself of other adequate means of asserting her rights . . ." by filing a separate action. *Head v. Jellico Housing Auth.*, 870 F.2d 1117, 1124-25 (6th Cir. 1989). Application of this principle in this case could conceivably have foreclosed any intervention motion by petitioners, who were the named plaintiffs in the *Taylor* class action, even though approval of the *Bowling* settlement ultimately extinguished the *Taylor* class.

rule that circumscribes the availability of such review illustrates the importance of this case and is an independent reason why review by this Court is warranted and essential.

B. The Intervention Requirement Greatly Increases The Burdens On Litigants And The Courts.

Not only does the intervention requirement restrict appellate review of the merits of class action settlements, but it also greatly increases the burdens on litigants and the courts by enmeshing them in intervention-related proceedings. Ironically, several courts have justified the intervention requirement on the theory that permitting nonintervening objectors to appeal class action settlements will render the litigation "unwieldy." *Guthrie*, 815 F.2d at 628. *Accord Croyden*, 976 F.2d at 678; *Walker*, 858 F.2d at 1074. In fact, however, the rule espoused by these courts will result in greatly protracted and burdensome class action litigation.

In jurisdictions where intervention is required in order to appeal, every class member who is represented by counsel would presumably seek to intervene to leave open the possibility of an appeal. Due to the timeliness requirement of Rule 24, the time for filing intervention motions would likely begin to run when the would-be intervenor first received notice of the proposed class settlement and the fairness hearing date. This would force objectors to file their motions to intervene well before the fairness hearing commenced, even if the motions to intervene were filed solely out of an abundance of caution. Indeed, it would likely be necessary for the district court to rule on the intervention motions prior to the fairness hearing, so that the court and other parties would know how to treat the would-be intervenors.

Each separate motion to intervene would be entitled to full judicial consideration. Moreover, as the courts observed in *Guthrie*, 815 F.2d at 628, and in *Walker*, 858 F.2d at 1074, an order denying a motion to intervene as of right is a final,

appealable order that must be appealed from *immediately*, or the right to appeal is lost. The result would be that if the district court denied all or some of the motions to intervene (a highly possible outcome given the difficulty of establishing inadequacy of representation at this stage of the proceeding, *see* n.17, *supra*), there could be immediate appeals of the denials of intervention, and, if a stay is granted, a postponement of the fairness hearing while the appeals were being resolved.

The rule requiring intervention thus results in segmented appeals. While the appeals of rulings on the motions to intervene are pending, the class may have to wait for the results of the appeals before a fairness hearing can be held. The benefits of the proposed settlement are potentially delayed, and possibly jeopardized, if the settling defendant experiences a reversal of fortune when the intervention appeals are being decided. In cases where the settlement provides for class counsel's fees to be paid out of the settlement funds obtained for the class, the class members will ultimately pay the cost of intervention-generated litigation and appeals.[19]

For these reasons, requiring intervention as a condition of appeal not only burdens and elongates fairness hearings, but

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[19] An additional complicating factor is that the notice sent to class members typically offers little more than a thumbnail sketch of the litigation and a cursory outline of the main settlement terms. As a result, the notice often does not provide an adequate basis for class members to evaluate the adequacy of representation. It is not until the fairness hearing that problems in the adequacy of representation are likely to become evident to class members. This sets the stage for motions to intervene to be filed by the most skeptical class members immediately upon receiving class notice, with the probability that, if those motions are denied, and the denials are affirmed on appeal, a second wave of motions to intervene will be filed after the fairness hearing finally commences. The second wave of motions could bring the fairness hearing to another halt if they too are denied, and the denials are appealed. This startling prospect is "precisely the multiplicity of activity which Rule 23 was designed to avoid . . .." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 550-51 (1974).

diverts scarce judicial resources from the already complex process of evaluating class actions settlements. As one commentator has aptly summarized, the intervention requirement "produces more work for the district court (a formal motion in addition to the settlement hearing), no savings of time for the appellate court (in both cases it has conducted an appeal) and results in no review of the much more basic issue (the fairness and reasonableness of the settlement) by either court." Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 Univ. Chi. L. Rev. at 954. Preventing this waste is another important reason why review should be granted.

III. The Decision Dismissing Petitioners' Appeal Violated Their Right To Due Process And Is Such An Extreme Departure From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

The third reason the writ should be granted is because, in dismissing petitioners' appeal when neither the class notice nor published Sixth Circuit decisions notified petitioners that intervention was required, the Sixth Circuit not only violated petitioners' right to due process, but it so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners' odyssey began in February of 1992, when they were notified, for the first time, that a district court in Cincinnati had certified a global settlement class that could subsume the claims of the putative class in *Taylor*. There was no suggestion in the class notice that petitioners would have to intervene in order to have standing to appeal a decision approving the settlement over their objections. Given that due process requires that notice to a class member in a Rule 23(b)(3) class action must fully describe the action and the absent plaintiff's rights in it, *see Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985), and that the Sixth

Circuit's own published decisions unequivocally and unanimously hold that intervention is *not* required to confer standing on an objecting class member to appeal a district court decision approving a settlement, *see Sertic*, 459 F.2d at 579; *Cohen*, 127 at F.2d 724, petitioners had no reason to suspect that intervention would be a condition of appeal.

Petitioners were further lulled into a false sense of security by the actions of the settling parties and of the district court throughout the fairness hearing. Although petitioners were full participants throughout the proceedings (including filing motions, objections, discovery requests, and briefs and participating in numerous hearings, including the fairness hearing), neither Pfizer nor class counsel *ever* objected to petitioners' standing until their notice of appeal was filed. As for the court, not only did it grant petitioners' formal motion to be heard at the fairness hearing, *see Bowling*, 143 F.R.D. at 147, but it treated petitioners as *de facto* intervenors throughout the proceedings, *see* n.5, *supra*, and even went so far as to permit petitioners to file a *pro forma* fee petition because they intended to appeal the settlement's approval and defer the filing of a comprehensive fee petition *until their Sixth Circuit appeal was resolved*. RA 256. Either the district court was playing games with petitioners (which we doubt), or it, too, understood the law of the Sixth Circuit as not requiring intervention as a condition of appeal. To the extent the district court was operating under this theory, it was not alone: at least two leading commentators on class action proceedings[20] and two

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[20] *See* Wright, 7B *Fed. Practice and Procedure*, § 1797 at 360-61 ("Of course, if the class member appears in response to the notice and puts forth his objections, he can attack the dismissal or compromise on appeal from the entry of the final judgment") (citing, *inter alia*, *Cohen*); Moore, 3B *Moore's Federal Practice* ¶ 23.80[5] at 496 ("[a] member of the class who appears in response to the court's notice given pursuant to [Rule (e)], and objects to the dismissal or compromise has a right to appeal from an adverse final judgment although he did not become a formal party of record") (citing, *inter alia*, *Cohen*); Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. at 938 ("since *Cohen* . . . , the principle that an unnamed class member

other circuit courts[21] have identified the Sixth Circuit as *not* requiring objecting class members formally to intervene in order to have standing to appeal.

Despite the foregoing, the Sixth Circuit dismissed petitioners' appeal in an unpublished order that did not even refer to that court's own prior precedent, and instead cited three relatively recent cases from other circuits holding that intervention *is* required to confer standing to appeal. *See* Order reprinted at 1a-2a (citing *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1072 (5th Cir. 1988)).[22]

In so ruling, the Sixth Circuit continued its remarkable trend of issuing unpublished orders that conflict with prior

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who has objected in the court below has standing to appeal an order approving a settlement has been well-established in the Sixth . . . Circuit[ ], and indeed has become the most widely accepted solution to the question at hand") (footnotes omitted).

[21] *E.g., Bell Atlantic Corp.*, 2 F.3d at 1308 (3d Cir. 1993) (identifying Sixth Circuit as one of the courts that allows "unnamed, nonintervening class members standing to appeal approval of settlement agreements"); *Greenfield v. Villages Industries, Inc.*, 483 F.2d 824, 829 (3d Cir. 1973) (citing *Cohen* and *Sertic* for proposition that nonintervening, objecting shareholders have standing to appeal claim that they were wrongfully denied opportunity to participate in class action); *Research Corp. v. Asgrow Seed Company*, 425 F.2d at 1060 (7th Cir. 1970) (citing *Cohen* for proposition that, "[i]f a class member intervenes or even appears in response to a notice pursuant to Fed. R. Civ. P 23(e) and objects to the dismissal or compromise . . . , he has a right to appeal from an adverse final judgment").

[22] The Sixth Circuit did not even address petitioners' argument that, at a minimum, the district court's treatment of them qualified them as *de facto* intervenors under *Smartt v. Coca Cola Bottling Corp.*, 337 F.2d 950 (6th Cir. 1964), *cert. denied sub nom., Chambliss v. Coca Cola Bottling Corp.*, 380 U.S. 934 (1965). *See also Sales v. Marshall*, 873 F.2d 115, 121 (6th Cir. 1989).

published Sixth Circuit precedent on this question. That is precisely what occurred in *Police Officers*, 865 F.2d 260 (Table), and *Thompson*, 827 F.2d 770 (Table), where the Sixth Circuit issued unpublished orders dismissing the appeals of unnamed, nonintervening class members without even mentioning the contrary rule of *Cohen* and *Sertic*. Petitioners understandably were not aware of these unpublished decisions and, in any event, had no reason to predict a similar result in this case; as explained above, the Sixth Circuit's own Internal Operating Procedures provide that only *published* decisions have any precedential value, and that only an *en banc* court can overrule a published Sixth Circuit decision. *See* Sixth Circuit IOP 22.4; *Watts*, 978 F.2d at 270 n.1. Thus, petitioners reasonably relied on the rule of *Cohen* and *Sertic*, only to find that the Sixth Circuit does not adhere to the law it has announced in its published decisions.

Given that Congress has conferred a statutory right to appeal from adverse decisions of district courts, 28 U.S.C. § 1291, the Sixth Circuit's arbitrary denial of that right deprived petitioners of due process of law and should not be permitted to stand. *See Pennzoil Company v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (once state has created right to appeal, civil litigant "cannot, consistent with due process, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal") (Brennan, J., concurring); *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) (due process requires that, once the state has created a right of appeal, it must "offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal"); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (Fifth and Fourteenth Amendment Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants or as plaintiffs attempting to redress grievances).[23]

---

[23] If it was the Sixth Circuit's view that this Court's decision in *Marino* effectively overruled *Cohen* and *Sertic* and dictated the establishment of a new rule requiring intervention (a view that petitioners dispute), then the Sixth Circuit's own procedures mandate that the announcement of that new rule be

Not only is the Sixth Circuit's decision unfair and unconstitutional with respect to petitioners, but it also will likely prejudice class members in pending and future class actions filed in that jurisdiction. As the situation stands, because the Sixth Circuit has yet to overrule *Cohen* and *Sertic* by publishing a decision dismissing the appeal of a nonintervening class member, there is almost no way for class members whose cases are filed in the Sixth Circuit to know that they must formally intervene in order to have standing to appeal. Unless review is granted in this case, any appeals filed by such persons will most likely be dismissed without warning, regardless of the extent of the objectors' participation in the district court proceedings. Thus, the importance of this case extends well beyond the interests of petitioners. Review is necessary to protect the interests of all class members in pending and future class actions filed in the Sixth Circuit.

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published. *See* Sixth Circuit IOP 22.4 ("[d]ecisions determined to have precedential value are published in full-text form in the Federal Reporter"); *see also* Sixth Circuit Local Rule 24(a) (criteria for publication of decisions that "shall be considered by panels" include "whether [the decision] establishes a new rule of law, or alters or modifies an existing rule of law . . ."). Moreover, application of that new rule to the petitioners in this case would be so unfair as to require a holding of nonretroactivity. *See Chevron Oil Company v. Huson*, 404 U.S. 97, 107 (1971) ("'[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding "the injustice or hardship" by a holding of nonretroactivity'") (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)). This was the result in *Gottlieb*, 11 F.3d at 1014-15, where the Tenth Circuit held that objecting class members must intervene in order to have standing to appeal, but declined retroactively to apply its new rule to the class members in that case "in light of the fact that the rule we adopt was not readily apparent prior to our decision in this case . . .." *Id.*

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Date: June 1, 1994

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.,	)	**FILED**
	)	**DEC 21, 1993**
Plaintiffs-Appellees,	)	**LEONARD GREEN,**
	)	**Clerk**
ELIZABETH W. RIDGEWAY, et. al.,	)	
	)	ORDER
Appellants,	)	NOT RECOMMENDED
v.	)	FOR FULL TEXT
	)	PUBLICATION*
PFIZER, INC., et. al.	)	
	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order approving the settlement of this product liability class action suit. Defendants Pfizer, Inc. and Shiley, Inc. move to dismiss, pursuant to Fed. R. App. P. 27, for lack of jurisdiction.

Because the appellants are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal. *See Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987); *see also Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251.

(1993); *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988). Therefore, the motion to dismiss this appeal is granted.

ENTERED BY ORDER OF THE COURT.

/s/ Leonard Green
Clerk

FILED
Mar 4 -1994
LEONARD GREEN, Clerk

No. 92-3973

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, ET AL.,	)	
	)	
Plaintiffs-Appellees,	)	
	)	
ELIZABETH W. RIDGEWAY, ET AL.,	)	
	)	
Appellants,	)	
v.	)	ORDER
	)	
PFIZER, INC., ETC., ET AL.,	)	
	)	
Defendants-Appellees.	)	

BEFORE: RYAN and SUHRHEINRICH, Circuit Judges; and LIVELY, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.,

Plaintiffs, NO: C-1-91-256

vs.

PFIZER, et al. MEMORANDUM

Defendants.

Given that notices of appeal have been filed in this class action (see docs. 258, 278), the Court has concluded because of the uncertainty of its continuing jurisdiction in this case for any purpose, that no application or motion currently pending addressed to this Court will be decided by this Court until this case has been remanded to it by the Court of Appeals for further proceedings, or this Court has been directed by the Court of Appeals to decide any of such pending applications or motions.

SO ORDERED.

Dated: Nov 9, 1992

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

No. 92-4297

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.,	)	**FILED**
	)	**DEC 21, 1993**
Plaintiffs-Appellees,	)	**LEONARD GREEN,**
	)	**Clerk**
ELIZABETH W. RIDGEWAY, et. al.,	)	
	)	ORDER
Class Members-Appellants,	)	NOT RECOMMENDED
v.	)	FOR FULL TEXT
	)	PUBLICATION*
PFIZER, INC., et. al.	)	
	)	
Defendants-Appellees.	)	

* Sixth Circuit Rule 24 limits citations to specific publications. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. *This notice is to be prominently displayed if this decision is to be reproduced.*

BEFORE: RYAN and SUHREINRICH, Circuit Judges; LIVELY, Senior Circuit Judge.

Elizabeth W. Ridgeway, Rosemary Grunsby, and Fred Grunsby appeal the district court's order declining to rule on their belated motion to intervene in this class action. The appellants are unnamed class members who object to the settlement that has been reached between the plaintiff class, represented by Arthur Ray Bowling, and the defendants, Pfizer, Inc., et al. The sole issue in this appeal is whether the district court had jurisdiction to decide the appellant's motion to intervene, which was filed after their notice of appeal was filed. The members of the panel unanimously agree that oral argument is not needed. Fed. R. App. P. 34(a).

On September 10, 1992, the district court issued a sixty-four page opinion approving the settlement of the class action litigation. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). The appellants filed a notice of appeal on September 17, 1992, and then on September 24, 1992, filed a motion to intervene in the district court. Concluding that the notice of appeal divested it of jurisdiction, the district court declined to rule on the motion to intervene. The appellants now contend that under *United Airlines v. McDonald*, 432 U.S. 385 (1977), a district court retains jurisdiction to consider a motion to intervene even after a notice of appeal has been filed. We disagree.

In *McDonald*, the Supreme Court held that putative class members could intervene for the purpose of taking an appeal of the denial of class certification even though their motion was made after entry of a final judgment. *Id.* at 394-95. In *McDonald*, however, the unnamed class members moved to intervene *before* filing a notice of appeal. *Id.* at 390. In contrast, the appellants filed their motion to intervene *after* filing a notice of appeal.

As a general rule, a notice of appeal deprives the district court of jurisdiction over the action and transfers jurisdiction to the appellate court. *Lewis v. Alexander*, 987 F.2d 392, 394 (6th Cir. 1993). In *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990), the Seventh Circuit held that there simply was no action in which a putative class member could intervene where she filed her motion to intervene on the same day that she filed her notice of appeal. We agree, and we conclude that because the appellant's notice of appeal divested the district court of jurisdiction, the district court quite correctly declined to rule on the motion.

Therefore, the district court's order is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ARTHUR RAY BOWLING, et al.,	:	C-1-91-256
Plaintiffs,	:	ORDER
v.	:	
PFIZER, INC., et al.,	:	
Defendants.	:	

This matter is before the Court on the Objecting Pennsylvania Class' ("Movant") Motions to Intervene (doc. 265) and (doc. 267). The Movent [sic] sought leave from this Court to intervene in this action. The Court declined to rule on the motions to intervene, finding that the Court lacked jurisdiction as a notice of appeal had already been filed. The Sixth Circuit affirmed that ruling and by separate order held that the Movent [sic], as unnamed class members who had neglected to intervene in a timely fashion, lacked standing to pursue their appeal objecting to the settlement.

Accordingly, because of the substantial delay between approval of the settlement and return of this case to this Court, and the fact that intervention at this point would be prejudicial to the class, in the interest of justice, we hereby DENY the Movant's motions to intervene.

SO ORDERED.

Dated: April 5, 1994

/s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

No. 94-3519

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARTHUR RAY BOWLING, et al.	)	**FILED**
	)	MAY 17, 1994
Plaintiffs-Appellees,	)	LEONARD GREEN,
	)	Clerk
ELIZABETH W. RIDGEWAY; ROSEMARY GRUNSBY; FRED GRUNSBY, Class Members, on on behalf of themselves and as representatives on behalf of the Pennsylvania Class Objectors	)	
Appellants,	)	
v.	)	ORDER
PFIZER, INC.; SHELLEY, INC.,	)	
Defendants-Appellees.	)	

Appellants, objector-class members in this product liability class action, appeal the order denying their Rule 60(b) motion seeking reconsideration of the approval of a settlement agreement. In a prior appeal, appellants sought review of the order approving the settlement. That appeal was dismissed on the ground that appellants lacked standing. *Bowling v Pfizer, Inc.*, No. 92-3973 (6th Cir. Dec. 21, 1993). Following that dismissal, the district court denied appellants' motion to intervene on April 4, 1994. On April 12, 1994, the district court denied the Rule 60(b) motion.

Appellants' notice of appeal was filed on May 3, 1994.

Appellants have been denied permission to intervene in this action. It appears, therefore, that they lack standing to appeal the denial of the Rule 60(b) motion. *See Gottlieb v. Wiles*, 11 F.3d 1004, 1008-12 (10th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987). Although appellants may have standing to appeal the denial of their motion to intervene, the notice of appeal specifically states that they are appealing the April 12, 1994, denial of the Rule 60(b) motion. Consequently, it does not appear that appellants have standing to pursue this appeal. *See Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 516 (6th Cir. 1991) (a party specifying a certain order in the notice of appeal is precluded from seeking review of other orders on appeal).

Appellants are hereby directed to show cause, within fourteen days of the entry of this order, why this appeal should not be dismissed for lack of jurisdiction.

ENTERED PURSUANT TO RULE 8(b)
SIXTH CIRCUIT RULES

Leonard Green, Clerk,

/s/ Leonard Green

(2)
Supreme
FILED
JUL 1 1994
OFFICE OF THE CLERK

No. 93-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

vs.

PFIZER INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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19 pp

QUESTION PRESENTED

Whether petitioners, as unnamed, nonintervening class members—who have a separate action pending in state court against defendants, and who affirmatively rejected multiple opportunities to opt-out of a Rule 23(b)(3) class action settlement—have standing to appeal from a judgment approving a class settlement satisfactory to the class representatives and all other class members.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1912

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

VS.

PFIZER INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents, Plaintiffs' Class Bowling, et al., oppose the Petition for a Writ of Certiorari.[1] The Court of Appeals for the Sixth Circuit dismissed petitioners' appeal upon the basis of established principles of appellate standing as set forth by this Court, and applied by the Courts of Appeal. Additionally, the facts of the instant case are so particular to this matter

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[1] Respondents have no Rule 29.1 parent companies or subsidiaries.

that this case is not suitable for review by the Supreme Court.

ADDITIONAL OPINION BELOW

The decision of the district court, from which appeal was taken, is reported at 143 F.R.D. 141 (S.D.Ohio 1992).

STATEMENT OF THE CASE

Bowling, et al. v. Pfizer Inc, et al., the litigation from which the instant petition arises, is a product liability class action which was brought on April 19, 1991 by living recipients implanted with the Bjork-Shiley Convexo/Concave Heart valve and their spouses. The Convexo/Concave Heart valve was manufactured by defendant Shiley Incorporated, a wholly-owned subsidiary of defendant Pfizer Inc. Plaintiffs' class alleges that the Convexo/Concave Heart Valve is inherently defective in that the product has a propensity to fracture. Plaintiffs' class includes approximately fifty thousand (50,000) valve recipients residing world-wide.

Petitioners are neither named parties nor intervenors to the *Bowling* litigation, but merely two valve recipients and one spouse who are class members. Petitioners filed a state court class action, *Taylor v. Shiley*, in February 1986, on behalf of Convexo/Concave Heart Valve recipients residing in Pennsylvania, only, with large (but not small) valves, who did not have pending lawsuits. (R. 143, Ex. D: Second

Amended Complaint In *Taylor v. Shiley*, at p. 34).[2] In September, 1989, more than three years after initial filing of their Pennsylvania lawsuit, plaintiffs first moved for class certification. Their motion for certification has been pending before the state court for more than four years. No class has been certified in the state court action. Neither have class counsel been appointed in the action, nor has any communication with members of that putative class ever been undertaken or ordered by the state court. No class settlement has been negotiated in *Taylor v. Shiley*. Petitioners allege that they were well situated to obtain a sizable recovery upon the behalf of the putative Pennsylvania class. This allegation is false and was determined to be "specious" by the district court. *Bowling*, 143 F.R.D. 141, 161 (S.D.Ohio 1992). Precedential case law negates the viability of any cause of action by petitioners under Pennsylvania law. *Brinkman v. Shiley Inc.*, 732 F.Supp, 33 (M.D.Pa. 1989), *aff'd* 902 F.2d 1558 (3rd Cir. 1989); *Angus v. Shiley, Inc.*, 989 F.2d 142 (3rd Cir. 1993).

On January 23, 1992, the *Bowling* case was conditionally certified as a Rule 23(b)(3) opt-out class action by the district court. (R. 48: Order Certifying The Conditional Settlement Class And Scheduling A Fairness Hearing).

In January, 1992, class counsel and counsel for defendants entered into a proposed settlement agreement. Subsequent to the issuance of appropriate no-

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[2] Citations to the record are to the district court docket numbers.

tice to the class, the proposed settlement agreement was the subject of fairness hearings before the district court on June 5, 8, 9, 1992 and July 22, 1992. In accordance with the notice provided the class, any class member who wished to participate during the hearings was permitted to do so. The Court also permitted non-class members claiming an interest in the outcome to participate, including the representatives of consumer groups. As indicated by the transcripts of proceedings (R. 202: Transcript Of Fairness Hearing; R. 207: Transcript Of Fairness Hearing; R. 208: Transcript Of Fairness Hearing; R. 224: Transcript Of Fairness Hearing; and R. 251: Transcript Of Fairness Hearing), the district court heard from more than forty different American and foreign counsel and individuals, as well as considering written communications to the Court by class members who could not be present. A multitude of individuals participated vigorously in the process. No person who desired to be heard was refused.

By electing to opt-out, class members did *not* waive their opportunity to be heard or to object to the proposed class settlement. Petitioners' assertion to the contrary is untrue. *Bowling*, 143 F.R.D. at 155-56. During a May 19, 1992 status conference, prior to the fairness hearings and prior to the date petitioners were to elect whether to opt-out, all attendees, including petitioners, were specifically informed of this by the district court. (R. 122: Civil Minutes at p. 28).

Petitioners received class notice of the *Bowling* settlement in February, 1992, and the complete text of the proposed agreement was available for their inspection. On February 26, 1992, less than one month after the proposed settlement had been reached,

petitioners provided the state court with a status report wherein petitioners advised the state court of the *Bowling* proposed settlement and indicated that petitioners were meeting with defendants regarding the terms of the settlement. (R. 255: Second Supplemental Memorandum By Defendants In Support Of Settlement, Ex. 1). Moreover, the district court granted petitioners' request for written discovery of the terms of the settlement from class counsel and defendants prior to the fairness hearings.

Petitioners were given three opportunities to opt-out of the *Bowling* settlement. Yet, petitioners each time affirmatively elected to remain within the *Bowling* settlement class. (R. 224: June 9, 1992, Transcript of Proceedings, at pps. 92-95; R. 251: July 22, 1992, Transcript of Proceedings, at p. 83).

On August 19, 1992, the District Court issued a sixty-eight page Order Finding The Proposed Settlement To Be Fair. *Bowling*, 143 F.R.D. 141. On September 10, 1992, the District Court entered its Judgment Certifying The Settlement Class And Approving The Class Settlement. (R. 255).[3]

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[3] Petitioners have mischaracterized the benefits provided by the *Bowling* settlement. The value of the settlement negotiated in *Bowling*, as approved by the district court, has been estimated to be from Two Hundred Fifteen Million ($215,000,000) Dollars to as great as Five Hundred Million ($500,000,000) Dollars. The settlement provides, in part, for research to develop diagnostic techniques to identify valve recipients who have a significant fracture risk, research to characterize or reduce the risk of valve replacement surgery, unlimited funding for payment of expenses associated with valve replacement surgery, including disability benefits, payment for medical and psychological consultations, and unlimited funding to provide compensation in the event of

On September 17, 1992, petitioners filed their notice of appeal to the Court of Appeals for the Sixth Circuit. (R. 258). Petitioners were the only class members to appeal the district court's rulings. Petitioners did not seek to intervene prior to filing a notice of appeal.[4] Petitioners' assertion that "the district court gave every indication that intervention was *not* required (Pet. at 7) is unjustifiable and unfounded.

On September 25, 1992, petitioners filed a belated motion to intervene in the district court, despite the fact that the filing of the notice of appeal had already divested the district court of jurisdiction. By memo-

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fracture. An accurate description of the settlement is set forth by the opinion of the district court at *Bowling*, 143 F.R.D. at 148-50.

[4] The position taken by petitioners in their appeal is completely contrary to that taken by their counsel in a hearing before state court Judge Lord in *Taylor v. Shiley* on December 29, 1992. Exhibit C-1 to the transcript of that hearing (R. 334) indicates that petitioners' counsel applauded the *Bowling* settlement from the standpoint of his three clients:

> [A]lthough our clients were offered the opportunity to opt [out] of the *Bowling* case, they elected to stay in the case and obtain the benefits of the *Bowling* settlement . . . One of our clients has been identified as a candidate for a re-operation, which means that her Pfizer heart valve would be removed and a new heart valve implanted. Under the *Bowling* settlement, this client could expect to receive substantial compensation and to thus be able to afford the procedure. Accordingly, the prospect of waiting many, many years for a resolution of the *Taylor* case, compared to the relief provided by a prompt implementation of the *Bowling* settlement was something that the client considered. The other client who has a working heart valve is also in a fragile state of health.

randum decision dated November 9, 1992, the district court determined that it would not decide the motion to intervene. Petitioners appealed from the district court's memorandum decision also.

On December 23, 1993, the Sixth Circuit issued two Orders. The first Order affirmed the district court's determination that it lacked jurisdiction to rule on the motion to intervene while petitioners' appeal was pending.[5] (Pet. App. at 6a). The second Order dismissed the principal appeal. Citing to *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988), the Court of Appeals held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 1a).

Petitioners then petitioned for rehearing *en banc*, relying upon *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942) and an alleged inconsistency between *Cohen* and the more recent unpublished decisions of the Sixth Circuit. Respondents were asked to file a response, addressing these specific allegations, and did so.

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*, noting that the petition had been circulated among all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had

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[5] Petitioners have not sought certiorari as to this decision.

"further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet. App. at 3a).

SUMMARY OF REASONS FOR DENYING THE WRIT

The question presented by the petition has already been resolved by this Court in *Marino v. Ortiz*, 484 U.S. 301, 304 (1988).

The facts underlying this petition are so particular to this matter, and unusual, that the case is not suitable for review by the Supreme Court, to wit: the nonparty, nonintervening petitioners are the sole class members seeking to overturn a class settlement, in which petitioners affirmatively elected to participate after being given three opportunities to opt-out; and petitioners have their own separate lawsuit (*Taylor v. Shiley*) pending against defendants in a Pennsylvania state court.

Petitioners' argument that dismissal of their appeal violated their constitutional right to due process is meritless and based upon a misinterpretation of 28 U.S.C. Section 1291, and a misunderstanding of Rule 24(c) of the Court of Appeals for the Sixth Circuit.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED PRINCIPLES OF APPELLATE PROCEDURE ESTABLISHED BY THIS COURT AND CONSISTENTLY APPLIED BY THE COURTS OF APPEAL.

The question presented by the petition has already been resolved by this Court in *Marino v. Ortiz*, 484

U.S. 301, 304 (1988). Therein, the Court specifically and conclusively held that only individuals who are parties, or those who properly become parties, may appeal a judgment. Citing to *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977)(appeal from denial of class action certification), this Court also rejected the suggestion made by the Second Circuit that there could be exceptions to this rule, finding instead that a nonparty is to seek intervention for purposes of appeal.

Subsequent to *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by nonparty class members has ruled that such do not have standing to appeal. *Bowling v. Pfizer*, No. 92-3973 (6th Cir. 1993) (Pet. App. at 1a); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Petitioners' argument that there is a "split" among the circuits as to the issue of a nonparty class member's standing to appeal a judgment approving a class settlement is unfounded. No Court of Appeals presented with this issue has declined to follow the holding of *Marino*.

Petitioners rely primarily upon decisions rendered prior to *Marino*. While petitioners cite to three cases decided after *Marino*, none stand for the proposition asserted by petitioners. In *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), a nonparty class member was found not to have standing to appeal a post-settlement order im-

plementing a settlement agreement. In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3rd Cir. 1993), nonparty class members appealed from a denial of their motion to intervene. The appeal was dismissed by the Third Circuit upon the basis that the appeal was interlocutory in nature and not immediately appealable. Thus, the factual and procedural circumstances present in *Carlough* were far different than those of the instant petition, wherein petitioners neglected to intervene prior to appealing a final judgment approving a class settlement. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3rd Cir. 1993) was a shareholders' derivative suit, not a class action, and therefore "inapposite". *Gottlieb*, 11 F.3d at 1010-11 (10th Cir. 1993). Indeed, *Bell Atlantic* itself stated that "one of the rationales offered in support of an intervention requirement cannot apply to derivative actions" because "unlike members of a class certified under Rule 23(b)(3), 'shareholders normally cannot opt out of the class and pursue their own individual action.'" *Bell Atlantic*, 2 F.3d at 1308 n.4 (citation omitted).

The supposed "split" among the circuits, argued by petitioners, is nonexistent. Subsequent to this Court's decision in *Marino*, the Courts of Appeal have uniformly held that non-party class members do not have standing to appeal from a judgment in a class action. No reason exists for this Court to grant review.

The reasoning underlying the rule that non-party class members do not have standing to appeal from a judgment in a class action is based upon sound legal and policy considerations. First, unnamed individual class members cannot represent the class absent the procedures provided for in Fed.R.Civ.P. 23, for neither plaintiffs nor counsel can represent a class ab-

sent a district court's finding on issues such as adequacy of representation. Second, class members who disagree with the course of a class action have adequate procedures available to them, such as collateral attack, through which they can protect their interests. Procedures applicable include intervention and the right to opt-out of a case designated as a Rule 23(b)(3) class action.[6] Third, class actions would become unmanageable and non-productive if each member could individually decide to appeal, thereby defeating the very purpose of class action lawsuits. *See, Croyden*, 969 F.2d 675; *Walker*, 858 F.2d 1071; *Guthrie*, 815 F.2d 626.

II. THE UNIQUE AND UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT.

The petition is unsuitable for review by this Court, due to the unique and unusual facts of this case, to wit: petitioners seek to overturn a class settlement which they affirmatively elected to join after being given three opportunities to opt-out; petitioners had, and still have, their own separate lawsuit against defendants (*Taylor*) pending in the Pennsylvania state

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[6] The "opportunity to opt-out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members." *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977). Class members are in an advantageous position because "they [know] the terms of the settlement before having to decide whether to opt out." *Weinberger v. Kendrick*, 698 F.2d 61,72 (2d Cir. 1982), *cert. denied*, 464 U.S. 818 (1983). *In re Beef Industry Antitrust Litigation*, 607 F.2d 167, 175 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981) (in making an opt-out decision, settlement class members "can benefit from the specific knowledge of the amount of recovery they can expect from remaining in the class".).

court; petitioners seek to overturn a class settlement which petitioners characterized to the Pennsylvania state court as one which provided petitioners with substantial, necessary, needed benefits and compensation; petitioners are the only class members seeking to overturn a class settlement which was acceptable to class representatives and all other members of the class.

These foregoing facts should make clear that petitioners have an unstated personal agenda which has nothing to do with the merits of the *Bowling* settlement. Their agenda involves personal financial gain. Petitioners only hope for accomplishing such requires them to continue to delay and disrupt implementation of the *Bowling* settlement through appeal.

III. PETITIONERS' "DUE PROCESS" ARGUMENT IS MERITLESS.

Petitioners argue that dismissal of their appeal violated their constitution right to due process of law. Relying upon 28 U.S.C. Section 1291, petitioners assert that they have a statutory right to appeal regardless of standing. Petitioners' reliance is misguided, for that statute grants appellate jurisdiction to the courts of appeal, not an absolute right to appeal regardless of standing.

Petitioners also assert that they had a right to rely upon pre-*Marino* rulings of the Court of Appeals for the Sixth Circuit on the issue of standing to appeal,[7] and to ignore the Court of Appeals' more recent decisions which hold that non-party class members lack

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[7] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

standing to appeal, due to the fact that the decisions were unpublished.[8] Yet, the Sixth Circuit routinely cites its unpublished decisions as precedent, and Rule 24(c) of the Sixth Circuit permits the citing of unpublished cases of precedential value. Petitioners further allege that the position of the Sixth Circuit is unclear on the issue of standing to appeal, yet the Tenth Circuit found the Sixth Circuit's position to be quite clear and cited to *Police Officers for Equal Rights v. City of Columbus* in *Gottlieb*, 11 F.3d at 1010. These same arguments were presented as well to the Court of Appeals when petitioners requested a rehearing *en banc*, and no member of the Sixth Circuit found petitioners' arguments to be worthy of consideration.[9]

Last, petitioners stated that the district court led them to believe that intervention was unnecessary and that the district court treated them as *de facto* intervenors. There is no support for such an argument. Petitioners were treated as objecting class members, and nothing more. Moreover, petitioners were treated in the exact manner as the district court treated objecting non-class members, and any other

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[8] *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988) (unpublished, text available on LEXIS and WESTLAW); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (6th Cir. 1987) (unpublished, text available on LEXIS and WESTLAW).

[9] Petitioners also argued to the Sixth Circuit that the panel assigned to their appeal was biased against them, and such was evidenced by the fact that the order dismissing their appeal was not designated as an "opinion" to avoid full text publication thereby assuring that the order would receive as little scrutiny as possible from other members of the court. This argument was also nonpersuasive to the Sixth Circuit.

interested individuals or entities, who were permitted to fully participate in the fairness hearing process. The district court never indicated that it considered petitioners to be intervenors, or parties. Assertions to the contrary are simply untrue.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

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No. 93-1912

(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in dismissing for lack of standing petitioners' appeal from a judgment finding a class action settlement in a product liability case to be fair, adequate and reasonable, where:

— the three petitioners were the only ones of more than 50,000 class members who appealed;

— petitioners were non-parties who neglected to file a motion to intervene until after they had already filed a notice of appeal; their belated motion to intervene was denied because the district court was divested of jurisdiction; the Court of Appeals affirmed the denial of intervention; and certiorari is not sought from that decision; and

— after studying the settlement terms, petitioners deliberately chose to join the settlement class rather than exercise their opportunity to opt out and pursue their long-standing parallel action that was pending in another court?

RULE 29.1 LISTING

Respondent Shiley Incorporated is a wholly-owned subsidiary of respondent Pfizer Inc. Shiley Incorporated has no subsidiaries that are not wholly owned.

Respondent Pfizer Inc has no parent company. The following is a list of its direct or indirect subsidiaries (except those that are wholly owned):

Subsidiary	Place of Incorporation
Pfizer Biogal L.L.C.	Hungary
Pfizer Egypt S.A.E.	Egypt
Pfizer Limited	Ghana
Pfizer Limited	India
Dumex Limited	India
Duchem Laboratories Limited	India
PT Pfizer Indonesia	Indonesia
Livestock Feeds PLC	Nigeria
Pfizer Products PLC	Nigeria
Pfizer Laboratories Limited	Pakistan
Pfizer Korea Limited	South Korea
Pfizer Pharmaceuticals Ltd.	People's Republic of China

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1912

ELIZABETH RIDGEWAY, *et al.*,

Petitioners,

—v.—

PFIZER INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondents Pfizer Inc and Shiley Incorporated oppose the Petition for a Writ of Certiorari, which seeks review of a Court of Appeals decision dismissing an appeal from a judgment approving a class settlement. Petitioners are non-party class members who failed to file a timely motion to intervene in the district court. The Court of Appeals dismissed petitioners' appeal based on settled principles of appellate standing established by this Court and consistently applied by the Courts of Appeals. Further, petitioners (a) failed to move to intervene until after the district court had been divested of jurisdiction; (b) passed up repeated opportunities to exclude themselves from the class and pursue their own previously-filed parallel action against the defendants in state court; and

(c) attempted to challenge on appeal a class settlement that they deliberately chose to join. These unusual facts, which are unlikely ever to be repeated, render this case unsuitable for review by this Court.

ADDITIONAL OPINION BELOW

The decision of the district court, from which appeal was taken, is reported at 143 F.R.D. 141 (S.D. Ohio 1992).

STATUTES AND RULES INVOLVED

The petition involves the following rules: Rules 23 and 24 of the Federal Rules of Civil Procedure and Rule 3 of the Federal Rules of Appellate Procedure. The pertinent provisions of these rules are set forth in the appendix hereto.

STATEMENT OF THE CASE

This class action was settled on terms satisfactory to the defendants, the class representatives and the overwhelming majority of class members. Of more than 50,000 members of the class, only three—the petitioners—seek to overturn the settlement on appeal.

The three petitioners had full opportunity to exclude themselves from the class *after* they studied the settlement terms. They chose to remain class members. Then, after the district court entered a judgment approving the settlement as fair, adequate and reasonable, they filed a notice of appeal. The Court of Appeals dismissed the appeal on the ground that petitioners—having failed to become parties by intervening in the district court—lacked standing to appeal.

This action was brought on April 19, 1991, on behalf of recipients of an artificial heart valve and their spouses. Artificial heart valves, made of metal and synthetic materials,

are surgically implanted to replace diseased and failing human heart valves. Prior to the development of early models of artificial heart valves some 30 years ago, all persons who suffered from diseased heart valves became seriously disabled and soon died from their illness. Respondent Shiley was a pioneer in developing artificial heart valves, which have saved tens of thousands of lives.

The class was defined to include only those Shiley artificial heart valve recipients whose valves continued to function as expected to sustain their lives without adverse incident. The class members' claims were *not* based upon any failure or malfunction of their valves, but solely upon their alleged concern about the small chance of malfunction sometime in the future. At the time the action was settled, such claims—to recover for alleged anxiety about a working device—had been rejected as a matter of law by some 27 courts around the country, including the Courts of Appeals for the Third, Fourth, Fifth, Eighth and Ninth Circuits. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 147, 162-63, 165 (S.D. Ohio 1992).[1] The class settlement provides not only cash payments, but also medical and health benefits which the overwhelming majority of class members—many of whom are aged and ill from underlying heart disease—desire to receive as soon as possible.

Settlement negotiations between defendants and the class representatives began in July, 1991, and culminated in the execution of an agreement on January 23, 1992. (Record

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[1] Petitioners' assertion that these cases involved "merely . . . negligence and product liability theories" rather than "fraud and other intentional torts" (Petition for Writ of Certiorari ("Pet.") at 3) is incorrect. Fraud or other intentional torts were alleged in many of the cases; the courts nevertheless held that there is no cause of action under any theory for concern that a properly functioning product might fail. However, as the district court observed, "[o]ne California court allowed the plaintiff with a properly functioning heart valve past the summary judgment stage of litigation, based on a fraud theory." *Bowling*, 143 F.R.D. at 147.

("R.") 48, attachment).[2] As authorized by Fed. R. Civ. P. 23(c)(1), the district court then conditionally certified the class for purposes of settlement.[3] (R. 43). Pursuant to Fed. R. Civ. P. 23(c)(2) and (e), the court approved the notice of the settlement to be provided to class members. (R. 44). At an estimated cost of over $4 million, the notice was mailed to every valve recipient for whom an address was known and was published in over 200 leading publications throughout the world. (R. 162, Pines Affidavit Exs. A, B; R. 202 at 26). The notice informed each class member of the opportunity to opt out of the class. (R. 44, Exs. A, B).

The three petitioners—two valve recipients and the spouse of one of them—are the named plaintiffs in an uncertified state-wide class action filed in 1986 against the defendants in the Pennsylvania Court of Common Pleas (*Taylor v. Shiley, Inc.*, No. 2087). In February 1992, petitioners received notice of the class settlement in this case through their counsel, and were thus expressly informed of their opportunity to exclude themselves from the class. Notwithstanding the fact that they had their own pending case against defendants, they elected to remain in the class. *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 155-56 (S.D. Ohio 1992).

Petitioners state that the class notice "informed petitioners that they could not object to . . . the proposed settlement if they elected to opt out of the class." (Pet. at 5). This is untrue. On May 19, 1992, before the opt out deadline, the district court told petitioners that they were free to opt out and also press their objections to the settlement. (R. 140 at 28; R. 202 at 8). As the district court stated in its opinion, petitioners' counsel "was free to have opted its clients out, and then could

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[2] Citations to the record are to the district court docket numbers.

[3] Petitioners state that the conditionally certified class was broader than that alleged in the original complaint (Pet. at 4), but they fail to mention that the complaint was amended to allege the broader class. (R. 47).

have voiced its objections to the proposed settlement at the fairness hearing." *Bowling*, 143 F.R.D. at 156. Petitioners turned this opportunity down, as well as two other opportunities—on June 9 and July 22, 1992—to opt out *after* they had appeared and objected to the settlement. (R. 208 at 92-95; R. 251 at 82-83).

Pursuant to Fed. R. Civ. P. 23(e), the district court conducted a fairness hearing on the proposed settlement on June 5, 8 and 9 and July 22, 1992. Petitioners, other class members and consumer advocacy groups were heard at length. As a result of suggestions by the court and counsel, the initial settlement agreement was substantially enhanced.[4] All class members represented by counsel—except for petitioners—as well as consumer advocate *amici*, then withdrew their objections. (*See* R. 251 at 56-61).

On August 19, 1992, the district court issued a 68-page order finding that the settlement is "fair, adequate and reasonable." *Bowling*, 143 F.R.D. at 170. Judgment was entered on September 10, 1992. (R. 255). Petitioners filed a notice of appeal from that judgment on September 17, 1992. (R. 258).

The three petitioners were the *only* class members who continued to express dissatisfaction with the judgment approving the settlement.[5] Yet petitioners did not ask any court to relieve them personally from that judgment. Instead, petitioners—who represent no one but themselves—sought to *overturn* on appeal the judgment that tens of thousands of their fellow class members desired.

At no time prior to petitioners' filing of a notice of appeal did they move to intervene. Petitioners' assertion that "the

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[4] The settlement approved by the district court provides benefits to class members worth at least $165 million and possibly more than $215 million. The settlement, which is mischaracterized by petitioners, is accurately described in the opinion of the district court. *Bowling*, 143 F.R.D. at 148-50.

[5] The petition for certiorari is brought solely on petitioners' own behalf and not on behalf of the uncertified *Taylor* class.

district court gave every indication that intervention was *not* required" (Pet. at 7) is untrue. The district court treated them as objecting class members, nothing more.

On September 25, 1992, eight days after they had filed a notice of appeal, petitioners belatedly filed a motion in the district court to intervene for purposes of appeal. (R. 265). By memorandum decision dated November 9, 1992, the district court concluded that it could not decide the motion to intervene because the filing of the notice of appeal had divested it of jurisdiction. (R. 297). Petitioners appealed from that decision as well. (R. 305).

On December 21, 1993, the Sixth Circuit affirmed the district court's order concluding that it lacked jurisdiction to rule on a motion to intervene filed in the district court after a notice of appeal. (Pet. App. at 6a). Petitioners have not sought certiorari with respect to that decision.

Also on December 21, 1993, the Court of Appeals issued the order for which certiorari is sought, which dismissed petitioners' principal appeal. The Court held that because the petitioners "are unnamed class members who neglected to intervene in the proceedings below, they lack standing to pursue this appeal." (Pet. App. at 1a). In support of its decision, the Court cited *Guthrie v. Evans*, 815 F.2d 626, 627-28 (11th Cir. 1987), *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 678-79 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993), and *Walker v. City of Mesquite*, 858 F.2d 1071, 1073-75 (5th Cir. 1988)—all of which held that non-party class members do not have standing to appeal.

Petitioners then petitioned for rehearing *en banc*, relying—as they do now—on the decision in *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942), and the supposed inconsistency between that case and more recent unpublished decisions of the Sixth Circuit. By letter dated February 1, 1994, the Court of Appeals directed respondents to file a response, "and respond particularly to the significance of *Cohen* . . . ." As requested, respondents showed that *Cohen* was not only dis-

tinguishable, but is also outdated in light of subsequent decisions of this Court and the 1966 amendments to the class action rules.[6]

On March 4, 1994, the Court of Appeals denied the petition for rehearing *en banc*. The Court noted that the petition had been circulated to all active judges of the Sixth Circuit, and that "no judge . . . requested a vote on the suggestion for rehearing en banc." The Court further stated that the original hearing panel had "further reviewed the petition for rehearing and [had] conclude[d] that the issues raised in the petition were fully considered upon the original submission and decision of the case." (Pet. App. at 3a).

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS APPLIED SETTLED PRINCIPLES OF APPELLATE STANDING ESTABLISHED BY THIS COURT AND CONSISTENTLY FOLLOWED BY THE COURTS OF APPEALS.

The issue raised in the petition has already been resolved by this Court. In *Marino v. Ortiz*, 484 U.S. 301, 304 (1988), the Court authoritatively ruled that "only parties to a lawsuit, or those that properly become parties [by intervening], may appeal an adverse judgment . . . ." The Court pointed out that the Federal Rules of Appellate Procedure provide that "[t]he notice of appeal shall specify the *party or parties* taking the appeal." Fed. R. App. P. 3(c) (emphasis added).

Marino affirmed dismissal of an appeal by a group of white police officers who appeared and objected to a proposed settlement of a class action brought by Hispanic members of the New York City Police Department. This Court held that the officers lacked standing to appeal, notwithstanding their par-

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[6] Defendant-Appellees' Memorandum in Opposition to Appellants' Petition for Rehearing *En Banc*, filed February 15, 1994.

ticipation in the proceedings below, because they "were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal." *Id.* at 304.

Following *Marino*, every Court of Appeals to be presented with an appeal from a class action judgment brought by non-party class members has ruled that non-party class members—like petitioners—do not have standing to appeal. *Bowling v. Pfizer*, No. 92-3973 (6th Cir. 1993) (Pet. App. at 1a); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988); *Shores v. Sklar*, 844 F.2d 1485 (11th Cir. 1988).

Thus, for example, the Eighth Circuit observed that "*Marino* provides substantial support for holding that unnamed class members who object to a settlement must move to intervene, and they will be denied standing to appeal when they have not done so." *Croyden*, 969 F.2d at 679.

Petitioners' principal argument for certiorari is that there is a supposed "split" among the Circuits. However, the cases that petitioners cite either were decided prior to *Marino*, or did not directly present the issue.

Not one of the post-*Marino* cases relied on by petitioners granted non-party class members standing to appeal from a judgment approving a settlement in a class action. In one case cited by petitioners, *In re VMS Limited Partnership Securities Litigation*, 976 F.2d 362 (7th Cir. 1992), the Seventh Circuit held that non-party class members did *not* have standing to appeal a post-settlement order implementing a settlement agreement. The Court specifically stated that "we offer no opinion" as to whether non-party class members would have standing to appeal from a judgment approving the settlement. 976 F.2d at 368 n.8.

Similarly, *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993), cited by petitioners, is tangential to the issue raised here. *Bell Atlantic* involved the appellate standing of an objecting shareholder in a shareholders' derivative action. The Court stated that "we need not decide whether different rules apply to objector appellate standing in class and derivative suits." 2 F.3d at 1307 n.4. Subsequently, the Tenth Circuit thoroughly analyzed *Bell Atlantic* and concluded that it was "inapposite" to the appellate standing of non-party class members, who differ from plaintiffs in shareholder derivative suits. *Gottlieb*, 11 F.3d at 1010.[7]

The final post-*Marino* case relied on by petitioners is *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), where the Court—without even citing *Marino*—said that class members who timely moved to intervene would be able to appeal from a final judgment. However, unlike this case, *Carlough* was not an appeal from a final judgment by non-party class members who failed to file a timely motion to intervene. Rather, *Carlough* was an interlocutory appeal from the denial of the class members' motion to intervene; the Third Circuit dismissed the appeal on the ground that the denial of the motion to intervene was not immediately appealable. Thus, *Carlough* did not squarely present the issue raised by the petition.

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[7] The Tenth Circuit explained why derivative suit cases such as *Bell Atlantic* are not on point:

> "[C]ases holding that an unnamed plaintiff in a shareholder derivative suit under Rule 23.1 has standing to appeal are inapposite. *See, e.g., Bell Atlantic* . . . . Rule 23.1 does not offer the same protective mechanisms offered by Rule 23. Unlike class actions under Rule 23, in shareholder derivative suits under Rule 23.1, a preliminary affirmative determination that the named plaintiffs will fairly and adequately represent the interests of the other class members is not a prerequisite to the maintenance of the action. . . . In addition, there is no opt out provision in shareholder derivative suits."

Gottlieb, 11 F.3d at 1010-11.

It remains to be seen if the Third Circuit will find non-party class members to have standing to appeal from a class action judgment when that Court is actually presented with such an appeal and is asked to consider the issue in light of *Marino*. At the very least, because the Third Circuit has not yet had occasion to apply *Marino* to an appeal from a final judgment by a non-party class member who failed to file a timely motion to intervene, this Court would benefit by allowing the issue to mature. *See United States v. Mendoza*, 464 U.S. 154, 160 (1984) (indicating the benefits of permitting the Courts of Appeals "to explore a difficult question before this Court grants certiorari"); *E.I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting "the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals").

The Tenth Circuit recently surveyed the very same cases relied upon by petitioners and found that "there is no true conflict." *Gottlieb*, 11 F.3d at 1009. The Court stated: "We hold that standing [of a non-party class member to appeal] is dependent upon a grant of intervention, *a result which we believe to be consistent with the rule in all of the circuits that have directly addressed the issue . . .*" 11 F.3d at 1006 (emphasis added).

In short, the purported "conflict" relied on by petitioners is an illusion. On appeals from final judgments in class actions, the Courts of Appeals have uniformly held, subsequent to this Court's decision in *Marino*, that non-party class members do not have standing to appeal. There is no reason for this Court to grant review.

II. THE DECISION BELOW IS SUPPORTED BY THE TEXT OF THE FEDERAL RULES AND THE POLICIES UNDERLYING CLASS ACTIONS SET FORTH IN THIS COURT'S DECISIONS

The decision below is amply supported by the language and underlying policies of the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In *Marino*, this Court relied on the text of the Federal Rules of Appellate Procedure in holding that "only *parties* to a lawsuit, or those that properly become parties, may appeal an adverse judgment." 484 U.S. at 304 (emphasis added). As the Court stated, Fed. R. App. P. 3(c) specifically requires that the notice of appeal specify the "party or parties" taking the appeal. *Id.*

This Court applied the same reasoning earlier this Term in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. United States Phillips Corp.*, 114 S. Ct. 425 (1993). There, the petitioner was a non-party whose motion to intervene was denied by the Court of Appeals. This Court dismissed the writ of certiorari as improvidently granted because the petitioner lacked standing to seek review. The court explained that the language of the statute creating the certiorari jurisdiction of this Court—28 U.S.C. § 1254(1)—speaks of "the petition of any *party* to any civil or criminal case . . . ." (Emphasis added).

The decision below is also supported by the language of the class action and intervention provisions of the Federal Rules of Civil Procedure. Those provisions make clear that absent intervention, class members are *not* parties to the action, and do not have the unqualified right to participate at every stage of the litigation in the district court and on appeal.

Thus, Rule 23(d) provides that "the court may make appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given . . . of the opportunity of members . . . to intervene . . . ." The Rule further states that the Court may "impos[e] conditions . . . on intervenors . . . ." As

shown by these provisions, the district court has broad discretion under Rule 23 to consider whether, and on what terms, individual class members should be permitted to intervene consistent with the prompt and efficient management of the litigation. If class members were entitled to participate as parties in all aspects of the action even without intervention, then the provisions of Rule 23(d), giving the court authority upon a proper showing to permit *or deny* intervention by class members, and to impose conditions on intervenors, would be superfluous.

Consistent with the language of the Federal Rules, the Advisory Committee Notes on the 1966 Amendments to Fed. R. Civ. P. 24 state that "[a] class member who claims that his 'representative' does not adequately represent him, and is able to establish that proposition with sufficient probability . . . should, as a general rule, be entitled to intervene in the action." Thus, the Federal Rules contemplate that if non-party class members wish to participate as parties in a class action, they must first intervene.[8]

Moreover, automatically permitting all non-party class members to appeal would be impractical and antithetical to the policies and purposes of Rule 23. Rule 23 sets forth a pro-

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[8] The Federal Rules distinguish between intervention and "entering an appearance through counsel." Any class member may "enter an appearance through counsel," Fed. R. Civ. P. 23(c)(2). This is not, however, the equivalent of intervention. As Professor Benjamin Kaplan, the reporter to the Advisory Committee, explains:

> "I read this 'appearance' as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.*, whether he should move to intervene. If 'appearance' is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under Rule 24, which is not automatic and requires a showing."

Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 n.137 (1967).

cedure through which common issues can be efficiently litigated in a single suit "when there are too many plaintiffs for proper joinder." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985). The rule seeks to *avoid* multiplicity of activity by providing for a " 'representative' suit to which some members of the class are parties, [who] may bind members of the class or those represented who were not made parties to it." *Hansberry v. Lee*, 311 U.S. 32, 41 (1940). As this Court has explained:

> "A federal class action is no longer 'an invitation to joinder' but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions."

American Pipe & Construction Co. v. Utah, 414 U.S. 538, 550 (1974). Accordingly, Rule 23 is structured to provide each class member with "procedural due process protection[s]" without being "fully a party in the traditional sense." *Shutts*, 472 U.S. at 808, 811-12.

The goals of manageability and efficiency would be compromised if each class member could individually decide to appeal. As the Eleventh Circuit explained:

> "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class, who would all otherwise have access to the court through individual lawsuits. . . . If each class member could appeal individually, the litigation could become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court *would defeat the very purpose of class action lawsuits*."

Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987) (emphasis added); *accord Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1074 (a non-party class member may not appeal absent intervention in the court below; "a contrary rule would result in the

frustration of the purpose behind class litigation"); *Gottlieb*, 11 F.3d at 1009 ("If individual appeals without formal intervention were to be permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.").

The Courts of Appeals have also pointed out that permitting appeals by non-party class members would be inconsistent with the representative nature of class actions. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073; *Guthrie*, 815 F.2d at 628. The problem is underscored by this case. The class representatives, who were determined by the district court to be adequate, are satisfied with the judgment and want its benefits now. Petitioners, who represent no one but themselves, seek to overturn that judgment against the wishes of the class representatives and the overwhelming majority of the class. "It is particularly appropriate" to dismiss an appeal by a non-party class member when the "class member's challenge to the adequacy of a settlement is contrary to the view of all the other class members." *Croyden*, 969 F.2d at 680.

Moreover, automatically permitting appeals by non-party class members without intervention is unnecessary to protect the class members' individual interests. In Rule 23(b)(3) actions, such as this, class members can protect their interests by exercising their right to opt out and pursue their own actions. *Croyden*, 969 F.2d at 678; *Guthrie*, 815 F.2d at 628; *Gottlieb*, 11 F.3d at 1009. Alternatively, if individual class members believe that they are not represented adequately by the class representatives, they can protect their interests by moving to intervene; or they can seek to avoid the effect of an adverse judgment by collateral attack. *Croyden*, 969 F.2d at 678; *Walker*, 858 F.2d at 1073-74; *Guthrie*, 815 F.2d at 628. "With these legal avenues available for individual class members, there is no need to permit an individual to appeal a judgment with which the class representatives, and presumably the

majority of the class members are satisfied." *Guthrie*, 815 F.2d at 628; *Croyden*, 969 F.2d at 678.

Petitioners ignore both the language of the Federal Rules and the policies underlying class actions set forth in decisions of this Court and the Courts of Appeals.[9] Instead, they incorrectly assert that "an appeal is often the only mechanism by which an absent class member can protect his or her rights" and that the right to opt out does not provide adequate protection because class claims are "frequently" too small to justify individual litigation. (Pet. at 14). But neither the Court below nor any other Circuit has held that a class member may never appeal; they merely held that intervention is a precondition. Certainly, any class member with the wherewithal to appeal will also have the wherewithal to file a motion to intervene. Petitioners' argument is also beside the point on the facts of this case: the petitioners *did* have their own pending separate action against the defendants, which they had been pursuing since 1986; they had repeated opportunities to opt out in order to continue pursuing that action; and they chose not to avail themselves of those opportunities.

Next, petitioners state that the intervention requirement will have "the practical effect of drastically limiting the availability of appellate review" of judgments in class actions. (Pet. at 18). The gravamen of petitioners' argument is that motions to intervene will often be denied (a) because the class members are already adequately represented by the class representatives, (b) because the class members can protect their rights by opting out, or (c) because the class members have their own separate action, as petitioners do here. (Pet. at 20-22).

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[9] Petitioners rely heavily on a law review note, Note, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 U. Chi. L. Rev. 933 (1993). The Tenth Circuit has stated that it "disagree[s] with this student's analysis," *Gottlieb*, 11 F.3d at 1012 n.7, as does every Court of Appeals to have squarely addressed the issue since *Marino* was decided.

However, when class members are already adequately represented or have alternative means of protecting their rights—and a motion to intervene is denied on that ground—there is no reason to give them standing to appeal. Thus, the fact that many intervention motions may properly be denied weighs strongly *against* granting all class members standing to appeal.

In addition, petitioners' generalizations about whether motions to intervene will be granted or denied are speculative at best. In this case, it is impossible to determine whether intervention would have been granted or denied, because petitioners failed to file a motion to intervene until after the district court had been divested of jurisdiction. Thus, a concrete factual setting is missing, and petitioners are forced to rely on unsupported speculation.

Petitioners also speculate that requiring intervention as a prerequisite to appeal "will result in greatly protracted and burdensome class action litigation." (Pet. at 23). But this theory is spun from petitioners' false assumption that class members would have to move to intervene as soon as they receive notice of the action. *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), holds to the contrary. In that case, this Court held that a motion to intervene solely for purposes of appeal may be timely even if made after judgment. *Accord Marino*, 484 U.S. at 304. Petitioners do not explain why the procedure recommended by this Court would be an undue burden on litigants or the courts. Nor do they present any evidence that the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits, which have all required intervention as a prerequisite to appeal, have encountered anything resembling the parade of horribles that petitioners have conjured up.

In short, the decision below is firmly rooted in the language of the Federal Rules, the decisions of this Court, and the policies that underlie class actions. Petitioners' arguments to the contrary are without merit.

III. THE UNUSUAL FACTS OF THIS CASE MAKE IT UNSUITABLE FOR REVIEW BY THIS COURT

Even if the issues raised in the petition were otherwise worthy of this Court's attention, the unusual facts of this case—which are unlikely ever to be repeated—make it unsuitable for certiorari. "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Supreme Court Rule 10.1. As this Court has stated:

> "[T]his Court does not sit to satisfy a scholarly interest . . . . Nor does it sit for the benefit of the particular litigants. . . . . 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). Therefore, the issue must be of broad importance to the public, not merely to the litigants. *Ticor Title Ins. Co. v. Brown*, 114 S. Ct. 1359, 1362 (1994); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

An unusual set of facts renders this case unworthy of this Court's discretionary review:

• Petitioners decided not to opt out *after* they studied the terms of the proposed settlement. Yet they seek to overturn on appeal a settlement that they deliberately chose to join. Such circumstances, if not unprecedented, are rare indeed.[10]

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[10] Many of the decided cases, including *Guthrie*, *Croyden* and *Walker*, have concerned classes that were certified under Rule 23(b)(2) and thus did not provide class members with the opportunity to opt out. In other cases, such as *Gottlieb*, the class was certified under Rule 23(b)(3) before settlement was reached; thus, the class members did not know the settlement terms when they had to decide whether to opt out. In *Carlough*, it remains to be seen whether individual class members will appeal should the pending proposed settlement be approved.

• Petitioners already had their own separate lawsuit (*Taylor*) pending against defendants in the Pennsylvania Court of Common Pleas, which they had been pursuing since 1986.[11] If petitioners thought that they were "well situated to obtain a sizable recovery" in *Taylor* (Pet. at 3), they were free to opt out and pursue that case. As petitioners admit (Pet. at 22 n.18), this fact casts doubt on whether a timely motion to intervene by petitioners would have succeeded. This highlights the fact that petitioners' rights were adequately protected and that they have not been deprived of any substantive right.

• The district court in this case gave petitioners the opportunity to opt out and *also* object to the settlement at the fairness hearing. Indeed, the court gave petitioners second and third opportunities to opt out *after* their objections were heard. These generous offers—far more than what was

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[11] Petitioners misstate the course of proceedings in the *Taylor* case. Petitioners waited three years after filing *Taylor* to move for class certification, and have never succeeded in obtaining certification. In 1987, the Pennsylvania Court of Common Pleas *granted* defendants' preliminary objections to the *Taylor* complaint as to all but two claims (intentional infliction of emotional distress and Magnuson-Moss Act warranty claims). Subsequently, defendants were granted summary judgment on all claims, including a claim of intentional misrepresentation, in another Pennsylvania case. *Brinkman v. Shiley, Inc.*, 732 F. Supp. 33 (M.D. Pa.), *aff'd*, 902 F.2d 1558 (3d Cir. 1989); *accord Angus v. Shiley Inc.*, 989 F.2d 142, 147 (3d Cir. 1993). Based on *Brinkman* and other developments in Pennsylvania law—which conclusively negated any cause of action—defendants then moved for summary judgment. The summary judgment motion was pending at the time the settlement below was approved. Petitioners have admitted—contrary to their assertions in the petition for certiorari (Pet. at 3)—that their claims in Pennsylvania probably would not survive summary judgment. (R. 335 at 7; R. 334, Ex. C-1).

In the eight years since *Taylor* was filed, petitioners have not taken a single deposition. (*See* R. 225, Ex. 4). Petitioners' failure to prosecute the *Taylor* action is due to no fault of defendants: as petitioners have admitted to the Pennsylvania court, defendants' counsel has been " 'cooperating' and using its 'best efforts' to facilitate plaintiffs' discovery." (R. 225, Exs. 1-3).

required by the Federal Rules—were rejected. Petitioners chose to remain in the class and seek to disrupt and delay the settlement that the class representatives and all other class members desire.

• Due to petitioners' neglect, no record has been developed as to the propriety of intervention in this case. Petitioners failed to file a motion to intervene until after they had filed a notice of appeal which divested the district court of jurisdiction. If they had filed a timely motion to intervene and intervention had been granted, the question of standing to appeal would never have arisen. If, on the other hand, a timely motion to intervene had been denied, this Court as well as the Court of Appeals would have had the benefit of the reasons given by the district court for denying intervention. As the case stands, petitioners call upon the Court to assess their issue in a vacuum.

In sum, the unusual and atypical facts of this case make it unsuitable for certiorari review.

IV. PETITIONERS' "DUE PROCESS" ARGUMENT WAS NOT RAISED BELOW, IS MERITLESS AND DOES NOT DESERVE REVIEW BY THIS COURT

Petitioners argue that the dismissal of their appeal violated their constitutional right to due process of law. However, this argument was not raised below, and it is settled that "ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *accord Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("question . . . not raised in the Court of Appeals . . . is not properly before us).[12]

[12] On page 5 of their petition for rehearing *en banc*, petitioners included rhetoric that in dismissing their appeal, the Sixth Circuit "created the unavoidable impression that [it] not only was biased in favor of Appellees, but that it was not bound by . . . Appellants' right to due process under the Constitution." This is not sufficient to preserve the issue for review by this Court. First, "[i]t has been the traditional practice of

Moreover, as set forth below, petitioners' argument is based on contested factual allegations (which this Court is ill-equipped to resolve) and on a misunderstanding of the local rules of the Sixth Circuit (which are best left for the Sixth Circuit to interpret for itself).

Petitioners first contend that they were "lulled into a false sense of security" by the district court, which treated them as "*de facto* intervenors." (Pet. at 26). Nothing of the sort took place. Petitioners were treated as objecting class members, no more. At no time did the district court indicate that petitioners were parties to the action, or that they would be treated as intervenors.

In *Marino*, this Court rejected the proposition that appearing at a fairness hearing to object to a settlement—as petitioners did—confers standing to appeal. 484 U.S. at 304. One thing is certain: petitioners' allegation that they were "lulled into a false sense of security" does not present any serious, broadly applicable issue deserving of this Court's attention.

Petitioners next assert that they had a constitutional right to expect the Sixth Circuit to follow two of its older, pre-*Marino* published decisions,[13] notwithstanding this Court's subsequent decision in *Marino* and the Sixth Circuit's more recent decisions holding that a non-party class member lacks standing to appeal. *See Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988) (unpublished, text available on LEXIS and WESTLAW); *Thompson v. Kentucky*,

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this Court . . . to decline to review claims raised for the first time on rehearing in the court below." *Wills v. Texas*, 114 S. Ct. 1867, 1867 (1994) (O'CONNOR, J., concurring in denial of certiorari). Second, a "vague appeal to constitutional principles does not preserve . . . due process claims." *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988).

[13] *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942); *Sertic v. Cuyahoga, Lake, Geauga and Ashtabula Counties Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972).

827 F.2d 770 (Table) (6th Cir. 1987) (unpublished, text available on LEXIS and WESTLAW).

Petitioners proceed under the misapprehension that unpublished decisions of the Sixth Circuit may not be relied on. The Rules of the Sixth Circuit specifically provide that "[i]f counsel believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision *may be cited* . . . ." Sixth Circuit Rule 24(c) (emphasis added). Indeed, the Sixth Circuit routinely cites its unpublished decisions as precedent.[14]

While petitioners state that "it is difficult to state precisely where the Sixth Circuit stands" (Pet. at 15), the Tenth Circuit had no trouble determining the Sixth Circuit's position, based on the Sixth Circuit's unpublished decision in *Police Officers*:

> "We . . . note that the Sixth Circuit recently followed *Guthrie*, holding that unnamed class members had no standing to appeal from the approval of a settlement. *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (6th Cir. 1988) (unpublished disposition, text available on LEXIS)."

Gottlieb, 11 F.3d at 1010 (footnote omitted).

In any event, the Sixth Circuit is best positioned to determine the current state of the law in the Sixth Circuit. In its initial decision and then on rehearing, the Sixth Circuit determined that its pre-*Marino* decisions do not control this case.[15]

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[14] *See, e.g., Preslar v. Secretary of Health and Human Services*, 14 F.3d 1107, 1112 (6th Cir. 1994); *United States v. Tipton*, 11 F.3d 602, 607 (6th Cir. 1993), *cert. denied*, ___ S.Ct. ___, 1994 WL 213324 (June 13, 1994); *United States v. Reece*, 994 F.2d 277, 278-79 (6th Cir. 1993); *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-05 n.5 (6th Cir. 1992).

[15] *Cohen* was a shareholder derivative suit brought on behalf of a corporation; accordingly, there was no opportunity for the shareholder-

No judge on the Sixth Circuit considered the issue deserving of *en banc* consideration. Petitioners do not raise any issue of general applicability and public importance requiring this Court's review.

Petitioners' constitutional argument suffers from another infirmity as well. Petitioners state that *when there is a right to appeal*, that right may not arbitrarily be denied. However, there is no right to appeal when an appellant lacks standing to appeal.[16] Petitioners' argument, therefore, is inapposite.

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plaintiff to opt out. Because "there is no opt out provision in shareholder derivative suits," such cases are "inapposite." *Gottlieb*, 11 F.3d at 1010-11.

Similarly, *Sertic* did not directly present the issue here. Included in the *Sertic* appeal was an appeal from the district court's denial of motions to intervene; the Court held that intervention should have been granted. 459 F.2d at 581, 583. Here, in contrast, petitioners failed to move intervene until after their appeal on the merits had deprived the district court of jurisdiction; the Court of Appeals affirmed the district court's denial of the belated motion; and petitioners do *not* seek review of that decision.

[16] Contrary to petitioners' assertion (Pet. at 28), 28 U.S.C. § 1291 simply grants appellate jurisdiction to the Courts of Appeals. It does not do away with settled principles of appellate standing.

CONCLUSION

It is respectfully requested that the petition for writ of certiorari be denied.

Dated: New York, New York
July 1, 1994

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT PROVISIONS OF THE RULES INVOLVED

Rule 23 of the Federal Rules of Civil Procedure in pertinent part provides:

> (a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> * * *
>
> (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.
>
> **(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**
>
> * * *
>
> (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable

> effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.
>
> * * *
>
> **(d) Orders in Conduct Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members . . . of the opportunity of members . . . to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors . . . .
>
> **(e) Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rule 24 of the Federal Rules of Civil Procedure in pertinent part provides:

> **(a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the

applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Rule 3 of the Federal Rules of Appellate Procedure in pertinent part provides:

(c) **Content of the Notice of Appeal.** A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. . . . In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class.

FILED
JUL 18 1994
OFFICE OF THE CLERK

No. 93-1912

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

Elizabeth Ridgeway, *et al.*,
Petitioners,

v.

Pfizer, Inc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEFS IN OPPOSITION

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ARGUMENT

I. *MARINO* DID NOT RESOLVE THE QUESTION PRESENTED IN THIS CASE OR ERADICATE THE SPLIT AMONG THE CIRCUITS.

Respondents' principal argument in opposition is that review is unwarranted because the split in the circuits described by petitioners is "nonexistent." Bowling Opp. at 10; Pfizer Opp. at 7-10. They claim, first, that the initial question presented in this case -- whether nonintervening, unnamed class members have standing to appeal a class certification and class action settlement -- was already resolved by *Marino v. Ortiz*, 484 U.S. 301 (1988). Having made this claim, they assert that the pre-*Marino* cases cited in the petition are irrelevant, and that, since *Marino* was decided, every court of appeals to consider the issue has concluded that only intervening class members have standing to appeal a settlement's approval.[1]

Respondents are wrong on all counts. First, *Marino* did not resolve the question of whether absent class members must intervene in order to have standing to appeal. Unlike petitioners, the objectors in *Marino* were not even members of the class action at issue. Rather, they were an unofficial group of *white* police officers who sought to challenge a consent decree settling a Title VII lawsuit which provided that *black* and *hispanic* candidates for promotions on the police force would receive favorable treatment.

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[1] Respondents do not even address the issue, also encompassed within the initial question presented in this case, of whether an unnamed class member has standing to appeal an order *certifying a class action*. All the cases cited by respondents concern appeals of orders resolving the *merits* of class action cases. This omission is not surprising, since it makes particularly little sense to require class members to intervene in order to establish that they should not have been included in the class in the first place.

This Court held that, "because petitioners were not *parties to the underlying lawsuit*, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving the lawsuit's settlement." 484 U.S. at 304 (emphasis added).

Despite the fact that *Marino* only addressed the question of whether nonintervening *strangers* to a class action have standing to appeal a settlement's approval, respondents seize on *Marino*'s reference to "parties to the underlying lawsuit" and maintain that this Court must have intended its limitation on appellate standing also to encompass unnamed *class members* who object but do not formally intervene in the proceedings. What respondents forget is that unnamed class members have often been denominated and treated as "parties" by this Court and others, without regard to whether the class members have formally intervened in the action. *See, e.g.*, *Hoffman-La Roche Inc. v. Sperling*, 493 U.S. 165, 177 (1989) (Scalia, J., dissenting) ("In Rule 23 class actions, the members of a class which qualifies for certification are *parties* to the action . . ..") (emphasis added); *American Pipe and Construction Co v. Utah*, 414 U.S. 538, 550-51 (1974) ("claimed members of the class st[an]d as *parties* to the suit until and unless they . . . cho[o]se not to continue") (emphasis added); *In re Cement Antitrust Litigation (MDL No. 296)*, 688 F.2d 1297, 1310 (9th Cir. 1982) ("On some occasions, courts have expressly described class members as *parties*") (emphasis added), *aff'd sub nom. Arizona v. U.S.D.C. for the Dist. of Arizona*, 459 U.S. 1191 (1983). Indeed, a leading authority on class action procedure has recognized that "[c]ertainly class members are *parties* for purposes of . . . objecting to and appealing from an order approving a class settlement . . .." Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992) (emphasis added).

Thus, *Marino*'s holding that only "parties" have standing to appeal a class action settlement's approval cannot be construed to bar nonintervening, unnamed class members from obtaining

appellate review. In fact, given this Court's tendency to refer to unnamed class members as "parties," *Marino* supports the opposite result. In any event, as the Third Circuit has recognized, *Marino* did not "settle[ ] whether an objecting member of the class or derivative litigation who is not a named party may appeal the court's approval of the compromise." *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1307 (3d Cir. 1993).[2]

Given that *Marino* is not dispositive of the intervention question presented in this case, all the pre-*Marino* cases holding that absent class members have standing to appeal class action settlements are still good law.[3] These decisions are in direct conflict with the rulings of four other circuits, including the Sixth Circuit's decisions in this and two other unpublished cases.[4]

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[2] *Marino* also did not alter the views of the three leading treatises on class action procedure that intervention is *not* required for absent class members to have standing to appeal. *See* James W.M. Moore, 3B *Moore's Federal Practice*, ¶ 23.80[5], at 23-496 (Matthew Bender, 1993); Herbert Newberg & Alba Conte, 1 *Newberg on Class Actions*, § 1.04, at 1-13 (McGraw Hill, 3d ed. 1992); Charles A. Wright, *et al.*, 7B *Federal Practice and Procedure*, § 1797, at 360-61 (West, 2d ed. 1986 & Supp. 1994).

[3] *See In re Cement Antitrust Litig.*, 688 F.2d at 1309; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Armstrong v. Board of School Directors*, 616 F.2d 305, 327-28 (7th Cir. 1980); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1176 (9th Cir. 1977); *Patterson v. Stovall*, 528 F.2d 108, 109 n.1 (7th Cir. 1976); *Ace Heating & Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30, 33 (3d Cir. 1971); *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 (7th Cir. 1970).

[4] *See Gottlieb v. Wiles*, 11 F.3d 1004, 1012 (10th Cir. 1993); *Loran v. Furr's/Bishop's Inc.*, 988 F.2d 554, 554 (5th Cir. 1993); *Croyden Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1251 (1993); *Police Officers for Equal Rights v. City of Columbus*, 865 F.2d 260 (Table) (6th Cir. 1988); *Walker v. City of Mesquite*, 858 F.2d 1071, 1074 (5th Cir. 1988); *Thompson v. Kentucky*, 827 F.2d 770 (Table) (6th Cir. 1987); *Guthrie v. Evans*, 815 F.2d 626, 627 (11th Cir. 1987).

Respondents also err in claiming that, since *Marino*, all courts of appeals to consider the issue have held that intervention is a condition of appealing a settlement's approval. In fact, both the Third and Seventh Circuits have recently affirmed that, notwithstanding *Marino*, intervention is *not* a prerequisite for appeal. *See Carlough, et al. v. Amchem*, 5 F.3d 707, 714 (3d Cir. 1993); *Bell Atlantic Corp.*, 2 F.3d at 1310; *Matter of VMS Ltd. Partnership Sec. Litig.*, 976 F.2d 362, 368 (7th Cir. 1992).

Respondents' attempts to distinguish these cases are unavailing. According to Pfizer, *Bell Atlantic* and *Carlough* are not on point because the former was a shareholders' derivative action and the latter considered the standing question in a different procedural posture than that presented here. *See* Pfizer Opp. at 9. These are distinctions without a difference, because, in both cases, the Third Circuit strictly adhered to its pre-*Marino* precedents in holding that intervention is not a prerequisite for appellate standing.

In *Bell Atlantic*, following a lengthy discussion of the deep split in the circuits over the intervention question presented in this case, the Third Circuit held that nonintervening, objecting shareholders have standing to appeal the approval of a *derivative* action. 2 F.3d at 1310. In a footnote, the court stated that "[t]he parties have not contended and we need not decide whether different rules apply to objector appellate standing in class and derivative suits." *Id.* at 1037 n.4. In *Carlough*, however, the court went one step further to hold that intervention is not required to confer appellate standing on absent members of a *class* action. 5 F.3d at 714.

The *Carlough* appellants were class members who moved to intervene in the district court to object to the proposed settlement of a class action. Following the district court's denial of their intervention motion, the class members took an immediate appeal to the Third Circuit. The settling parties, both of whom opposed intervention, asserted that the district court's order was

not immediately appealable because, as objecting class members, the appellants would be able to appeal from any final order in the case. The objecting class members disagreed, arguing that immediate appeal was essential and appropriate because, to the extent the Third Circuit were to follow the lead of the Fifth, Eighth, and Tenth Circuits, *see supra* at n.4, the district court's order denying their motion to intervene would deprive them of standing to appeal any final decision approving the settlement. *Id.* at 713.

In language directly relevant to this case, the Third Circuit rejected this argument, stating that the decisions in other circuits requiring intervention as a condition of appeal "are directly contrary to our own holding in *Ace Heating and Plumbing Co., Inc. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971)." The Third Circuit emphasized that *Ace Heating*, which held that nonintervening, objecting class members have standing to appeal a class action settlement, was still binding precedent, especially in cases where -- as here -- the appeal was taken from an order approving a settlement (as opposed to a case litigated to judgment) and where -- as here -- the appellants participated in the proceedings before the district court. *Id.* at 714. The Court added that "[o]ur adherence to *Ace Heating* despite contrary rulings by other courts of appeals, including the rulings of *Croyden*, *Guthrie*, and *Walker*, all of which were cited in *Bell Atlantic*, is particularly appropriate in the context of a nationwide consolidation of mass tort litigation." *Id.*

Thus, in *Carlough*, the Third Circuit firmly and unequivocally held that unnamed class members do not need to intervene in order to have standing to appeal. This was despite the decision in *Marino*, which was decided well before *Carlough*. Pfizer's claim that, notwithstanding *Carlough*, "this Court would benefit by allowing the issue to mature" (Pfizer Opp. at 10) warrants no consideration.

Equally unconvincing is respondents' attempt to distinguish

the Seventh Circuit's post-*Marino* decision in *Matter of VMS Ltd. Partnership Securities Lit.*, 976 F.2d at 362. There, appellant was an unnamed, nonintervening class member who sought to appeal a *post*-settlement order implementing a class action settlement agreement. Although the Seventh Circuit dismissed the appeal for failure to intervene, it held that its pre-*Marino* decision in *Research Corp v. Asgrow Seed Co.*, 425 F.2d 1059 (1970), which stated that nonintervening class members have standing to appeal a settlement's approval, "would control in this circuit if [appellant] were appealing the approval of the settlement agreement (which it did not do) . . .." *Id.* at 368. Thus, the Seventh Circuit, like the Third Circuit, has made it crystal clear that nonintervening class members have standing to appeal a decision approving a settlement, despite the contrary rulings of four other circuits and notwithstanding the Supreme Court's decision in *Marino*.

In short, the split in the circuits with respect to the issue presented in this case is alive and festering. Further percolation among the lower courts will not assist this Court, since the courts of appeals have had ample opportunity to interpret and apply *Marino* -- with markedly different results. The issue is thus fully mature and ripe for resolution.

II. THE FACTS OF THIS CASE RENDER IT WHOLLY SUITABLE FOR REVIEW.

Respondents' second main line of attack is that the "unique" and "unusual" facts of this case make it unsuitable for review by this Court. Bowling Opp. at 11; Pfizer Opp. at 17. In fact, however, this case presents the intervention question in an entirely straightforward fashion. Petitioners are class members who objected to a proposed settlement but did not move formally to intervene prior to a decision certifying the class and approving the settlement. The intervention issue is not dependent on the underlying facts of the proceeding; it is simply whether, absent intervention, unnamed class members have standing to appeal. Respondents' assertions about the so-called unique facts of this

case are merely diversionary.[5]

Respondents attempt to make much of the fact that petitioners did not elect to opt out of the proceeding when they had the chance, choosing instead to remain in the class and object to the settlement. As explained in the petition, however, petitioners determined that they could not opt out of the *Bowling* settlement because, as they saw it, they had a fiduciary responsibility to protect the rights of the members of the putative Pennsylvania class whom they sought to represent in the *Taylor* proceeding. *See* Petition at 6.[6] Moreover, even if petitioners had no good reason to stay in the *Bowling* case, respondents' argument that their failure to opt out should preclude consideration of this case is tantamount to a claim that the issue presented here should *never* be decided -- since the only class members who could present it are class members who did not opt out.

Nor is the fact that petitioners' claims are still pending in the *Taylor* proceeding of any significance. If the *Bowling*

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[5] This is underscored by the scant nature of the Sixth Circuit's summary dismissal of petitioners' appeal. The Sixth Circuit did not rely on any "unique" or "unusual" facts to hold that petitioners lacked standing to appeal. To the contrary, the only "fact" stated in its skeletal order was that petitioners "are unnamed class members who neglected to intervene in the proceedings below." 1a.

[6] During the course of the proceedings in *Bowling*, petitioners' counsel asked the district court to certify a subclass that would conform to the class in *Taylor*. *See Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 161 (S.D. Ohio 1992). In response, the district court asked counsel for respondents if they would object to allowing petitioners to opt-out the entire *Taylor* class. Because respondents objected, the issue was dropped. RA 208 at 92-97. Moreover, contrary to respondents' argument, the district court did not extend the opt-out deadlines it set in the order approving notice to the class. RA 43. At a hearing held on May 19, 1992 (RA 140), certain class members asked the district court to extend the opt-out period to after the fairness hearing. The district court denied the motion (RA 140 at 46-48), stating that it had to "hold firm to the schedule we have." RA 140 at 54.

settlement is permitted to go forward, respondents will undoubtedly move for summary judgment in the *Taylor* proceeding, thereby extinguishing petitioners' claims in that action. In addition, as noted above, although petitioners could have opted out and pursued their own separate claims in *Taylor*, this would not have protected the unnamed members of the putative Pennsylvania class whom petitioners were duty bound to represent. Thus, the fact that "[p]etitioners already had their own separate lawsuit . . ." at the time the *Bowling* complaint was filed is a red herring. Pfizer Opp. at 18.

Respondents also press the point that petitioners are the only class members who are appealing the *Bowling* settlement. This is hardly unusual. In the class action context, it is rare indeed that numerous class members take an active role in the litigation. This is especially true in cases where, as here, a few class members take an extremely active role in forcefully advancing a wide range of objections to the settlement. If anything, the fact that petitioners are the last remaining challengers to the *Bowling* settlement counsels in *favor* of review being granted, since this is the only route by which there will be any appellate oversight of this class action affecting tens of thousands of heart-valve implantees world-wide.

Finally, the Bowling respondents argue that review is unwarranted because petitioners are allegedly pursuing "an unstated personal agenda that has nothing to do with the merits of the *Bowling* settlement" -- *i.e.*, "personal financial gain." Bowling Opp. at 12. This observation is ironic, since it is the Bowling respondents' counsel who have a substantial financial interest in harvesting the fruits of the proposed *Bowling* settlement -- an interest that is directly threatened by the prospect of appellate review. Moreover, petitioners will gain nothing if this Court grants review and recognizes their right to appeal unless they ultimately succeed in convincing the Sixth Circuit that the *Bowling* settlement is unfair. It is precisely because the Sixth Circuit has refused to hear petitioners' argument to that effect that review

should be granted by this Court.[7]

CONCLUSION

For the foregoing reasons, the Court should reject the arguments raised by respondents and grant this petition for a writ of *certiorari*.

Respectfully submitted,

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[7] With respect to the second question presented in the petition, respondents argue that the Sixth Circuit did not violate petitioners' right to due process by dismissing their appeal because "there is no right to appeal when an appellant lacks standing to appeal." Pfizer Opp. at 22. This argument begs the question, since the published decisions of the Sixth Circuit hold that nonintervening, unnamed class members *do* have standing to appeal a decision approving a class action settlement. *Sertic v. Cuyahoga Lake, Etc., Carpenters District Council*, 459 F.2d 579 (6th Cir. 1972); *Cohen v. Young*, 127 F.2d 721 (6th Cir. 1942). It is the Sixth Circuit's refusal to follow these published decisions -- decisions that clearly recognize a *right* to appellate review under the precise circumstances presented in this case -- that violated the Fifth Amendment's due process guarantee. Constitutional issues aside, the sheer unfairness of the Sixth Circuit's procedures constitutes such an extreme departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

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